7-2500-14486-2
PUC Docket No. P-421/CI-01-1371

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13, and 14

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

The above-entitled matter came before Administrative Law Judge (ALJ) Richard C. Luis for evidentiary hearing on August 6, 2002, September 4 through 18, 2002, and October 4, and 8 through 10, 2002, in the Large Hearing Room of the Minnesota Public Utilities Commission (MPUC), Suite 350, Metro Square, 121 Seventh Place East, St. Paul, Minnesota. The record closed on January 8, 2003.

Jason Topp, Attorney at Law, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota, 55402; Robert Cattanach and Shannon Heim, Attorneys at Law, Dorsey & Whitney, 220 South Sixth Street, Suite 1700, Minneapolis, Minnesota, 55402, Chuck Steese, Attorney at Law, 6400 South Fiddlers Green Circle, Suite 1710, Denver, Colorado 80111, and Andrew D. Crain, Attorney at Law, Qwest Corporation, 1801 California Street, 49th Floor, Denver, Colorado 80202, appeared on behalf of Qwest Corporation (QC or Qwest BOC).

Priti R. Patel and Virginia Zeller, Assistant Attorneys General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Commerce.

Rebecca DeCook, Steven Weigler, Letty Friesen and Richard Walters, Attorneys at Law, 1875 Lawrence Street, 15th Floor, Denver, Colorado, 80202, and Mark Witcher, Attorney at Law, 919 Congress Avenue, Suite 900, Austin, Texas 78701, appeared on behalf of AT&T.

K. Megan Doberneck, Attorney at Law, 7901 Lowry Boulevard, Denver, Colorado 80230, and Patrick Judge, Attorney at Law, Briggs and Morgan, 332 Minnesota Street, W-2200 First National Bank Building, Saint Paul, Minnesota 55101, appeared on behalf of Covad Communications.

Cecilia Ray, Attorney at Law, Moss & Barnett, 90 South Seventh Street, Suite 4800, Minneapolis, Minnesota 55402, appeared on behalf of the CLEC Coalition.

Lesley Lehr, Senior Attorney, 638 Summit Avenue, St. Paul, Minnesota 55105, appeared on behalf of MCI-WorldCom.

Diane Wells and Ray Smith, Public Utility Rate Analysts, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101, appeared in a neutral capacity on behalf of the staff of the Minnesota Public Utilities Commission.

NOTICE

Notice is hereby given that pursuant to Minnesota Statute § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed by such date as established by the Commission's Executive Secretary or as agreed to by the Parties with the Commission's Executive Secretary.

Questions regarding filing of exceptions or replies should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the ALJ's recommendation who request such argument. Such request must accompany the filed exceptions or replies, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions or replies, as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept, reject or modify the Administrative Law Judge's recommendations and that said recommendations have no legal effect unless expressly adopted by the Commission as a final order.

STATEMENT OF ISSUES

The issues in this matter concern whether Qwest has demonstrated by a preponderance of the evidence that it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B)[1] regarding items 1, 2, 4, 5, 6, 11, 13, and 14, provides adequate performance quality to support competition, and affords operating support system functionality in a manner that is capable of supporting competition and is not discriminatory.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. On September 11, 2001, the Minnesota Public Utilities Commission (Minnesota PUC) issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, Docket No. P-421/CI-96-1114.

2. In the Notice and Order for Hearing, the Minnesota PUC stated that a thorough and orderly development of certain factual matters will be required in the above-mentioned docket and therefore, referred the matter to the Office of Administrative Hearing (OAH) for contested case proceedings.

3. In the Notice and Order for Hearing, the Minnesota PUC indicated that it seeks a Report from the OAH making proposed findings and recommendations on issues relevant to Qwest's compliance with Section 271 of the Telecommunications Act of 1996 (Act), which is Qwest's compliance with OSS checklist items of the Act.

4. This matter was divided into six individual dockets involving issues arising from different aspects of the Act's standards for 271 approval. This docket addresses compliance with OSS checklist compliance under Section 271 ("the OSS Docket").

II. STATUTORY FRAMEWORK -- JURISDICTION AND AUTHORITY

5. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) such as Qwest into the provision of in-region interLATA ("long distance") services on compliance with certain provisions of section 271.[2] BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state.[3] The FCC must issue a written determination on each application no later than 90 days after receiving such application.[4]

6. Section 271 requires the FCC to make various findings before approving BOC entry. In order for the FCC to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[5] Qwest seeks approval under Track A, which requires that Qwest "have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[6] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in

section 271(c)(2)(B);[7] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[8] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[9] The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC "shall not approve" the requested authorization.[10]

7. The FCC has addressed questions of compliance with the competitive checklist in a number of 271 applications by BOCs to enter the interLATA market in their own regions. These FCC orders have been relied upon to clarify what issues need be addressed in this proceeding and are cited at appropriate points throughout this Recommendation.

8. The FCC must consult with the MPUC to verify whether Qwest has opened its local markets in Minnesota to competition in compliance with the requirements of Section 271(c).[11]

9. The Minnesota PUC has responsibility under Section 271(d)(2)(B) of the Act to advise the FCC whether to grant or deny Qwest's request to provide interLATA service within Minnesota.[12]

10. The FCC has defined a state commission's primary goal as development of "a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition. . . ."[13] In prior orders, the FCC has stated that it will "consider carefully state determinations of fact that are supported by a detailed and extensive record."[14]

III. BACKGROUND

11. In early October 2001, Qwest Corporation (the Qwest BOC) filed its petition with the Minnesota PUC seeking a finding of compliance with Section 271 of the Act. This proceeding is one of the dockets established under that petition to make a record upon which the Commission can base its recommendation to the FCC regarding Qwest's application for Section 271 approval.

12. Qwest, the Department, the CLEC Coalition, Covad, MCI-Worldcom, and ATT participated in the hearing. Witnesses for the various parties were allowed to present short summaries of their testimony. Counsel for parties were given opportunity to cross-examine the witnesses. Counsel for parties were given the opportunity to conduct redirect of their respective witnesses, if necessary.

13. Various motions were heard after the close of the hearing, both during and after the scheduled time for briefing. Some documents were allowed into the record, other documents were excluded, some issues stricken, and the FCC order in Qwest's nine state application was incorporated into the record.[15]

IV. ISSUES ADDRESSED IN THIS REPORT.

14. The hearing in this docket covered particular items in the competitive checklist, performance issues raised regarding Qwest's provisioning of interconnection to competing local exchange carriers (CLECs), and allegations of improper win-back efforts. A portion of this proceeding was conducted jointly with the proceedings in *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation Regarding Unfiled Agreements*, Docket no. P-421/C-02-197 (ALJ Recommendation issued September 20, 2002) ("Unfiled Agreements"). Throughout the proceedings, Qwest and the other parties engaged in an effort to resolve issues that were identified. The Judge has relied upon the parties' discussion of issues in the post-hearing briefs to identify those matters that continue to be contested. Wherever possible, a resolved issue will be identified as such in this Report.

V. SECTION 271(B)(2)(B) - COMPETITIVE CHECKLIST.

15. The Act requires that a BOC seeking to authority to provide intra-LATA service must demonstrate that the interconnection offered to CLECs allows competition. Section 271(b)(2)(B) of the Act sets out the items that must be demonstrated as follows:

> (B) **Competitive checklist**: Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).
> (iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
> (vi) Local switching unbundled from transport, local loop transmission, or other services.
> (vii) Nondiscriminatory access to--
> (I) 911 and E911 services;
> (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and
> (III) operator call completion services.
> (viii) White pages directory listings for customers of the other carrier's telephone exchange service.
> (ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone

numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

16. The fourteen items listed above are generally known as the "competitive checklist." List items 3, 7, 8, 9, 10, and 12 were analyzed in the companion docket, *In the Matter of a Commission Investigation Into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 3, 7, 8, 9, 10, and 12*, Docket No. P-421/C1-01-1370 (ALJ Recommendation issued May 8, 2002) (Non-OSS Docket). The remaining checklist items are addressed in this proceeding. Each will be analyzed individually.

VI. CHECKLIST ITEM 1 - INTERCONNECTION AND COLLOCATION.

17. Checklist Item 1, 47 U.S.C. § 271(c)(2)(B)(i), requires Qwest to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1). The FCC has defined “interconnection” as “the linking of two networks for the mutual exchange of traffic.”[16] The traffic exchanged is local, toll, and a variety of specialized traffic, including directory assistance, operator services, and 911. The Act requires Qwest to provide CLECs with interconnection:

(1) at any technically feasible point within the carrier’s network;

(2) that is at least equal in quality to that provided by the local exchange carrier to itself; and

(3) on rates, terms, and conditions that are just,reasonable, and nondiscriminatory.[17]

18. The FCC has identified six “technically feasible” points of interconnection: (1) the line-side of a local switch, (2) the trunk-side of a local switch, (3) the trunk interconnection points for a tandem switch, (4) central office cross-connection points, (5) signal transfer points, and (6) points of access to unbundled network elements.[18] The

FCC has determined that CLECs may "choose any method of technically feasible interconnection at a particular point on the incumbent LEC's ["ILECs"] network. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements."[19]

19. The FCC has defined "equal-in-quality" to require the ILEC "to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party."[20] The FCC has defined "just, reasonable, and nondiscriminatory" in the context of interconnection to mean:

> that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides comparable function to its own retail operations.[21]

20. The analysis of checklist issues is further broken down into the types of service at issue. For those checklist items that have a "retail analogue," an ILEC must provide the item or service in "substantially the same time and manner" as it provides similar services to itself.[22] For elements and items that do not have a retail analogue, an ILEC must provide "efficient competitors a meaningful opportunity to compete."[23] Once an ILEC provides an item or service, it must provide other carriers the item or service at the same level of quality.[24] Each item discussed in this Report is assessed using this framework.

21. Qwest identifies the FTTH Agreement, Arizona Dial Tone Agreement, and its Minnesota SGAT (collectively, interconnection agreements or "ICAs") as demonstrating the existence of a concrete and specific legal obligation to offer interconnection at any technically feasible point within its network.[25] These points of interconnection (POI) include locations inside and outside Qwest's central offices. Issues regarding the wording and anticipated effect of the ICAs will be discussed individually.

Entrance Facilities.

22. ATT asserts that, as described in the testimony in this proceeding, the ICAs redefine interconnection trunks as "entrance facilities, [which] are high speed digital loops."[26] AT&T describes Qwest's position as "the entrance facility is a 'transport system … that has one end at a CLEC's switch location or POI and the other end at the [closest] Qwest serving wire center.'"[27] AT&T maintains that the result of this interpretation is to compel the CLEC to accept the POI as the CLEC switch. AT&T asserts that compliance with the Act requires that Qwest make available the leasing of interconnection trunks "to the designated POI in the Qwest network at direct trunk transport rates."[28]

23. Qwest offered testimony disputing AT&T's characterization. In Qwest's view:

The ability to designate a POI within a Qwest building allows a CLEC to avoid using entrance facilities when interconnecting. The availability of this option is confirmed by the Arizona DialTone and FTTH interconnection agreement and in the SGAT at 7.1.2.2. Indeed, section 7.1.2 allows a CLEC to choose from multiple options for transport between networks. Only one option involves interconnection entrance facilities.[29]

24. In Arizona Dialtone at § 7.1.2, Qwest describes an interconnection arrangement it calls "entrance facility," in which Qwest establishes a transmission path between a Qwest wire center and a CLEC central office or other chosen POI to the nearest Qwest wire center.[30] This is a dedicated transport system that does not require switching of any kind. Qwest also permits what it calls collocation-based interconnection, in which the CLEC provides transport from its switch to collocated equipment at the Qwest wire center.[31] In a "mid-span meet" interconnection arrangement, Qwest and a CLEC each provide transport from their respective networks to a negotiated POI, subject to the limits of technical feasibility and equitable sharing of costs. In a mid-span meet, each party typically owns and operates its equipment on its side of the POI.[32]

25. Qwest also permits CLECs to interconnect with Qwest wire centers in different LATAs via a single point of interface, in which the CLEC provides transport from its end office through the Qwest tandem switch.[33] Alternatively, Qwest will permit a CLEC to provide a facility from a CLEC switch into Qwest end offices in different LATAs. Finally, Qwest maintains that it provides interconnection at an access tandem switch that, prior to the 1996 Act, carried only 1+ toll calls.[34] CLECs may request unique interconnection arrangements or modifications to existing interconnection arrangements through the Bona Fide Request (BFR) process, which Qwest will respond to within 30 days. If a request is technically feasible, Qwest and the CLEC negotiate price and implementation terms that generally do not exceed 90 days from Qwest's receipt of the request.[35]

26. Qwest currently provides interconnection trunks to 44 facilities-based CLECs in Minnesota. As of December 1, 2001, CLECs had 119,548 interconnection trunks in service in Minnesota.[36] Of those trunks, two-thirds connect CLEC end offices with Qwest end offices, and one-third connect CLEC end offices with Qwest tandem offices. Ninety-seven percent of the interconnection trunks were two-way trunks.[37]

27. Much of AT&Ts dispute with regard to entrance facilities relates to the pricing of elements used for providing those facilities. As AT&T noted, this issue was addressed in the pricing docket conducted as part of the pre-application inquiry by the Commission.[38] Qwest has met its burden of proof that the ICAs do not require the POI to reside at the CLEC switch.

Build-out Oversight.

28. AT&T asserts that the ICAs impose an improper limitation on Qwest's obligation to provide construction of facilities to enable interconnection. The limitation is

found at section 7.2.2.1.5 of the FTTH Agreement. AT&T maintains that the language in this section artificially limits the distance over which Qwest will provide direct trunk transport ("DTT"), thereby shifting the build-out burden to the interconnecting CLEC.[39] Since DTT is that portion of the transport facilities that runs between the Qwest central office switch to Qwest's tandem switch office, this obligation would appear to be on Qwest's side of the switch, and therefore would normally be the ILEC's responsibility.[40] AT&T maintains that Qwest's definition of DTT as being "only the transport facilities inside its own network between its own central office switches and tandem switches" compels the conclusion that Qwest must provide this facility if requested.[41]

29. Qwest disputes AT&T's claim, asserting that section 7.2.2.1.5 of the FTTH Agreement imposes no mandatory limitation on the length of CLEC-requested DTT. Qwest characterizes the provision as merely allowing Qwest to ask the Commission for resolution of any disagreement on how costs are to be addressed when the length of the facility to be provided exceeds 50 miles.

30. The general rule is that each party to the interconnection is responsible for its own build-out to the POI. That obligation, however, is not unlimited.[42] Qwest's characterization of the provision is somewhat misleading, since any disagreement over the application of a provision in an ICA can be brought to the Commission for resolution. Section 7.2.2.1.5 affords Qwest an agreed-upon distance of 50 miles beyond which Qwest can refuse to build, thereby triggering the ICA language interposing the Commission as the cost-apportioning entity.

31. Qwest points out that the language for section 7.2.2.1.5 is "consistent with the recommendations and orders in Washington, Colorado, Oregon, Nebraska, Iowa, Utah, New Mexico, Idaho, Arizona and Wyoming."[43] The FCC noted that this issue is currently the subject of rulemaking.[44] Since the proposed language does not require a particular outcome, but rather places that decision before the Commission, the ICA language does not conflict with the FCC observation that an ILEC is only responsible for the "*limited* build-out of facilities," to enable interconnection.[45] Qwest has shown by a preponderance of the evidence that the language for section 7.2.2.1.5 is consistent with Qwest's obligation under checklist item 1.

Trunk Reclamation.

32. ICA § 7.2.2.8.13 allows Qwest to reclaim trunks from CLECs for Qwest's use where the amount of traffic on the identified trunks falls below an established level of usage. AT&T objected to this provision (which it described as "snatch-back") as requiring CLECs to maintain a more efficient use of their trunk capacity than Qwest does itself. Qwest maintains that "no reduction in trunk size will occur so long as a CLEC can 'provide a reason' for maintaining excess capacity."[46] Qwest asserts that "no possible harm" has been suffered from the provision since Qwest has never exercised the reclamation provision.[47] Qwest maintains that the provision is needed to ensure that Qwest is not "forced to absorb the cost of excess trunks."[48] Qwest notes that its approach has been adopted by a number of states[49] and this is cited as a demonstration that the modified SGAT language is appropriate.

33. Failure to exercise the reclamation language does not demonstrate the absence of potential harm. As AT&T pointed out, the process of initially obtaining trunks requires that the CLEC incur costs that will not be reimbursed by Qwest upon reclamation of those trunks. As originally proposed, Qwest could have reclaimed trunks based on low usage, regardless of the CLEC's anticipated need for the trunks. This raises the potential for disrupting the CLEC's capacity to provide services and providing Qwest with a competitive advantage. Further, with the capacity to impose costs on CLECs for setting up new trunks, Qwest would have the incentive to "churn" the market for trunks by reclaiming them, even in the face of anticipated CLEC demand.

34. The FCC addressed this issue in the *Qwest Nine State Order*, finding that:

> Qwest states that while trunk reductions may occur when there is a need for such facilities, Qwest reclaims such trunks only after the competitive LEC has agreed to the reduction. We find Qwest's policy, particularly in light of its explanation that it would work closely with an affected competitive LEC prior to taking any action, to be reasonable. We further note that no competing LEC, including AT&T, has alleged that it has been specifically harmed by Qwest's policy, and that a unilateral reclamation of trunks by Qwest has not occurred in any of the application states.[50]

35. Qwest's qualification that it will not reclaim trunks where the CLEC "provides a reason" for retaining them is sufficient to avoid imposing unnecessary costs on CLECs. There is no reason to impose a cost on Qwest to construct additional facilities when unused capacity exists. Qwest has shown by a preponderance of the evidence that the language for section 7.2.2.8.13 is consistent with Qwest's obligation under checklist item 1.

LIS Trunk Forecasting.

36. Qwest noted that Worldcom had expressed concern over the burden imposed by the local interconnection service (LIS) trunk forecasting requirement since Worldcom used its own forms and did not want to reformat the data. Qwest agreed that CLECs should be able to use their own formats for data forecasting and amended the current and future ICAs to "allow" the use of the Qwest format rather than "require" that format. With the amendment, Qwest has shown the LIS trunk forecasting reporting provision to be nondiscriminatory.

Trunk Traffic Combination.

37. As initially proposed in SGAT § 7.2.2.9.3.2, CLECs are required to use separate trunk groups for interLATA, 1 + long distance calls and for local calls. CLECS objected, asserting that the most efficient use of interconnection trunking would combine all traffic types on the same trunks. Requiring separate trunking would increase the number of trunks any CLEC must purchase, increase the cost of interconnection for the CLEC, and increase the possibility that trunks would be reclaimed under ICA § 7.2.2.8.13. Qwest has agreed to allow the combination of trunk

traffic on the same trunks in the next Minnesota SGAT.[51] Modifying the SGAT to allow for the combination of traffic on trunk groups is needed to demonstrate compliance with checklist item 1.

Combined Traffic Pricing.

38. Special access facilities, such as DS3 or OCn, are leased by a CLEC from Qwest to transport end user traffic directly to the CLEC wire center. These facilities are also called private line facilities. Where spare capacity exists on the leased facility, it can also be used to haul interconnection trunks from the CLEC switch to the Qwest switch. AT&T asserts that where "a CLEC has an existing DS3 from Qwest to the CLEC office that is half full, it makes no sense to require the CLEC to order a second DS3 facility to haul a few interconnection trunks."[52] AT&T characterizes SGAT and ICA § 7.3.1.1.2 as allowing the use of "the private line or access facility for interconnection, but only if the CLEC overpays for those circuits that are used for interconnection."[53]

39. Section 7.3.1.1.2 of Qwest's FTTH Agreement and Minnesota SGAT governs the use of special access facilities. These facilities are capable of handling local interconnection traffic as well as the special access or private line facilities for which they are originally obtained from Qwest. AT&T maintains that SGAT and ICA § 7.3.1.1.2 effectively prevent a CLEC from using existing spare private line transport facilities for interconnection trunks by charging retail private line rates for the complete facility, including those trunks that should otherwise be billed as interconnection services under the reciprocal compensation requirements. AT&T suggests that proportional pricing can be used to appropriately charge the CLEC for the two types of traffic. Qwest disputes AT&T's position, asserting that it is providing the local transport to the CLEC at no charge and that the CLECs are seeking "the added benefit of a proportional decrease in the fixed cost of that facility because part of it can now be used for local interconnection."[54]

40. Qwest's position, that the transport is provided at "no charge," is inaccurate.[55] The CLEC has paid for the facility and is seeking to use spare capacity in an efficient manner to avoid leasing additional trunk capacity. The most efficient use of resources, from AT&T's point of view, is to price the facility based on the proportion of traffic carried on the special access or private line facilities. In effect, the CLEC would receive a discount on the cost of the leased facility for utilizing spare capacity for interconnection, since interconnection trunks cost less than the special access or private line facilities. Qwest maintains that this practice is "rate racheting" which has been found improper by the FCC and many state commissions.

41. The FCC has explicitly addressed the issue of racheting, stating that:

> [Net2000] proposes that DS3 circuits derived from both EEL-eligible and non-EEL-eligible DS1 circuits be priced utilizing "ratcheting," similar to mixed use DS3 circuits carrying both special access and switched access DS1s, so that proportionate unbundled network element rates would apply to the converted DS1s and proportionate special access rates would apply

> to the non-converted DS1s. The arguments made by Net2000, however, ignore the specific language of Option 3. **There is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for "ratcheting."** The language of Option 3 clearly and specifically requires that "[w]hen a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria." There is no ambiguity in this language. Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules.[56]

42. The argument advanced by AT&T has been turned down by the FCC. The controlling precedent is clear that re-pricing is appropriate only where all of the individual circuits are providing the lower cost interconnection trunk transport. There is no basis for imposing a variable pricing methodology on special access circuits carrying a combination of tariffed traffic and interconnection trunk transport.[57] CLECs have the benefit of utilizing spare capacity for carrying interconnection trunk transport that they would otherwise purchase additional trunks to carry. There is no basis for requiring the ILEC to re-price proportionately the special access facility by the type of traffic carried.

Cost of Interconnection at the Local Tandem and Access/Toll Tandem.

43. The parties have disputed what interconnection should be permitted at the local tandem and at what cost. Qwest has agreed to "revise the SGAT to allow for interconnection at the local tandem at the same cost as interconnection at the access tandem, using the language of Qwest's Utah SGAT, as recommended by the Multistate Facilitator."[58] AT&T objected to Qwest's use of the Utah language, asserting that this provision (Minnesota SGAT and the FTTH ICA § 7.2.2.9.6) lacks the cost provisions present in the Washington SGAT and intended to be required by the Multistate Facilitator.[59] Section 7.2.2.9.6 includes the statement, "Furthermore, Qwest may propose to provide Interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to CLEC as Interconnection at the access tandem."

44. AT&T asserts that the SGAT provision should also read:

> 7.2.2.9.6.1 Qwest will allow Interconnection for the exchange of local traffic at Qwest's access Tandem without requiring Interconnection at the local Tandem, at least in those circumstances when traffic volumes do not justify direct connection to the local Tandem; and regardless of whether capacity at the access Tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide Interconnection facilities to the local Tandems or end offices at the same cost to CLEC as the Interconnection at the access Tandem.

45. Qwest disputes the need for this language, asserting that AT&T's approach is restricted to those situations where the tandem capacity is exhausted or forced to exhaust.[60] Qwest has demonstrated that cost parity provisions are included in the SGAT provisions governing interconnection at the local tandem. Qwest has demonstrated that retaining flexibility in these connection provisions is an appropriate goal. Qwest has demonstrated by a preponderance of the evidence that the inclusion of the Utah version of SGAT §§ 7.2.2.9.6 and 7.2.2.9.6.1 is appropriate. AT&T's proposed version of § 7.2.2.9.6.1 reaches beyond what is required, and it is appropriate to reject that language.

Joint Provisioning of Non-Switched Exchange Access.

46. The CLEC Coalition asked Qwest to jointly provision non-switched exchange access services with a CLEC, to a third party. The purpose of the request was to eliminate differences in how Qwest jointly provisions these services with independent ILECs providing service in areas adjacent to territories where Qwest is the ILEC. Qwest agreed to the request and modified its order processing methods. As a result, Qwest will "process meet-point-billed private line orders with CLECs in the same manner it does so with other ILECs per tariff."[61] This change resolves the issue raised by the CLEC Coalition regarding joint provisioning.

E911 Trunking.

47. E911 is the emergency communications traffic used for dispatching police, fire, ambulance, and other first responders. That traffic is carried over trunk transport. Each CLEC is required provide this transport as part of the State's E911 plan. The CLEC Coalition sought a mid-span meet form of transport for E911. Qwest proposed a modification to SGAT § 10.3.7.4 to effect this change. The modified SGAT language of § 10.3.7.4 includes the following: “Facilities needed for 911 trunks can be provided by the CLEC, Qwest or a third party carriers [*sic*]. Qwest will jointly provide such facilities on a meet point basis, upon request, as described in Section 7.1.2.3.”[62] The language meets the CLEC Coalition's concern. Qwest has also agreed with a CLEC Coalition contention that the State should be billed for E911 transport that is consistent with the State’s E911 plan for the CLEC. To effectuate this change, Qwest is substituting the State as the customer of record for 911 transport where CLECs are currently being billed.[63] Qwest's modifications resolve the issues that had arisen regarding E911 trunking.

Mid-Span Meets.

48. Worldcom requested a number of changes to the SGAT language regarding mid-span meets.[64] Qwest agreed and modified SGAT § 7.1.2.3.[65] These modifications incorporate the language adopted by Colorado and Washington governing the terms of mid-span meets. Qwest's modification resolves the issues that had arisen regarding mid-span meets.

Status of Local Interconnection Service.

49. Worldcom objected to the references to LIS as a "service." Qwest agreed to modify § 7.1.1 and § 4 of the SGAT to remove those references (to LIS as a service) in the same manner as Qwest has done in other states.[66] Qwest's modifications resolve the issues concerning the status of LIS.

Inter-Tandem Routing.

50. WorldCom asserted that section 7.1.1 of the SGAT, governing inter-tandem routing, discriminated against CLECs. Qwest responded that the same routing of local calls is provided to CLECs and Qwest itself.[67] Worldcom indicated that it has no further issues with checklist item 1. Qwest has demonstrated by a preponderance of the evidence that no discriminatory practice exists regarding routing between tandems.

Collocation.

51. Collocation is another form of interconnection. Physical collocation is the placement of CLEC owned and maintained equipment necessary for loop interconnection in Qwest central offices or other premises. Qwest has shown that collocation is available at all Qwest premises that house network facilities, subject only to space restrictions. Options for physical collocation include caged, shared cage, cageless, InterConnection Distribution Frame ("ICDF"), remote, and common-area-splitter collocation.[68] Qwest defines each of these collocation products in Qwest's Product Catalog documentation ("PCAT") available on Qwest's website.[69] Qwest allows CLECs to collocate any equipment needed for interconnection or access to UNEs. That equipment is not excluded from collocation where the equipment also performs a switching function, provides enhanced services capabilities, or offers other functions. Collocation is provided on a first-come, first-served basis and is subject to the availability of space in the Qwest premises. Although there are no locations in Minnesota where a space limitation currently exists, Qwest has agreed to provide adjacent structure collocation.[70] Where no existing adjacent structure space would be available, Qwest has agreed to permit CLECs to construct or otherwise procure such an adjacent structure, on property owned or controlled by Qwest.

52. Qwest also provides virtual collocation as an alternative to physical collocation. Virtual collocation is a situation where Qwest installs and maintains the interconnection equipment at a Qwest premises on behalf of a CLEC. Qwest provides the same installation intervals for both physical and virtual collocation. The levels of quality set for installation and maintenance of collocation equipment and services are the same as those of Qwest's own analogous functions for its own comparable equipment. CLEC personnel are afforded access to physically collocated equipment and to common areas twenty-four hours a day, seven days a week. Qwest takes reasonable measures to ensure that CLEC equipment is afforded physical security equal to the security provided for Qwest's own equipment.

53. For an RBOC seeking § 271 approval, the FCC has indicated that a showing must be made regarding collocation, stating:

> To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our implementing rules. Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, helps the Commission evaluate a BOC's compliance with its collocation obligations.[71]

54. The FCC has also indicated that collocation provisioning "intervals significantly longer than 90 days generally will impede competitive LECs' ability to compete effectively."[72] Other intervals have been established by the FCC, including informing the CLEC within 10 calendar days after receiving an application whether that application meets the ILEC's collocation standards.[73] Physical collocation arrangements must be completed within 90 calendar days after receiving an application that meets the collocation standards.[74] The ILEC must finish construction and turn functioning space over to the CLEC within the 90-day interval.[75] Instances where the ILEC asserts that a longer interval is needed must be submitted to the appropriate state commission for approval.[76] The FCC has not established a particular provisioning interval for virtual collocation.[77]

Forecasting.

55. AT&T asserts that the SGAT creates "unwarranted exceptions to Qwest's obligations to provide timely and reasonable collocation for CLECs within the 90-day intervals."[78] The exception described by AT&T arises from the provisioning intervals for unforecasted physical collocation, unforecasted virtual collocation and unforecasted ICDF collocation orders.[79] The SGAT language complained of by AT&T provides that unforecasted orders result in an additional 60 days for Qwest to provision the requested collocation.

56. Qwest relies upon the its experience with other states in Qwest's region that have "agreed that forecasts are a reasonable prerequisite to standard intervals, and will greatly assist Qwest's planning for collocation and for CLECs to receive the shorter intervals."[80] Qwest maintains that its forecasting requirement is "reasonable and in accordance with the FCC's Collocation Reconsideration Order and Collocation Waiver Order."[81]

57. AT&T disputes whether the SGAT is in accordance with the FCC's *Order on Reconsideration* which states that:

> an incumbent LEC should be able to complete any technically feasible physical collocation arrangement, whether caged or cageless, no later than 90 calendar days after receiving an acceptable collocation

application, where space, whether conditioned or unconditioned, is available in the incumbent LEC premise and the state commission does not set a different interval or the incumbent and requesting carrier have not agreed to a different interval.[82]

58. The FCC has clearly stated that it expects ILECs to “upgrade their internal controls, methods, and procedures to the extent necessary to provision all, or virtually all, physical collocation arrangements in no more than 90 calendar days.”[83] The 90-day standard set out by the FCC does not require CLECs to forecast demand as required under the SGAT.

59. Qwest sought a waiver of the 90-day interval requirement pending the FCC’s consideration of Qwest’s Reconsideration Petitions. In assessing the waiver request, the FCC has clarified its position on the subject of intervals, stating that:

> The Collocation Reconsideration Order does not permit an incumbent LEC to set unilaterally different standards by incorporating time periods of its own choosing into its SGATs and tariffs and having those standards take effect through inaction by the state commission. Indeed, such an approach would eviscerate the Commission’s intent in the Collocation Reconsideration Order to establish national standards applicable except where specifically modified through interconnection agreement negotiations or deliberative processes of a state commission.[84]

60. The FCC granted an interim waiver to Qwest and explained that Qwest was allowed to:

> increase the provisioning interval for a proposed physical collocation arrangement no more than 60 calendar days in the event a competitive LEC fails to timely and accurately forecast the arrangement … . We expect Qwest to use its best efforts to minimize any such increases … .[85]

61. The SGAT language proposed by Qwest inverts what is intended by the FCC to be the exception, and makes that exception the rule. This would be appropriate in the event that Qwest had demonstrated by a preponderance of the evidence that specific problems arise when a CLEC has failed to forecast its needs. No such evidence was produced. Instead, Qwest relies upon assertions that material procurement may be difficult without forecasting. The testimony of Qwest’s witness on the issue, Ms. Bumgarner, failed to identify any particular problem regarding procurement that would justify an automatic 60-day extension for a CLEC failing to forecast collocation at a particular wire center.[86] Colorado has refused to provide extensions for unforecasted collocation intervals.[87]

62. Qwest is free to negotiate extensions of time beyond the 90-day provisioning standard established by the FCC in an ICA with a CLEC. Qwest has not shown in this proceeding that the absence of forecasting automatically requires a 60-

day extension. The forecasting language should be deleted from the SGAT, subject to the Commission's conclusion regarding complex collocations, *infra*.

Complex Collocation Limitation.

63. AT&T asserts that, in existing Minnesota ICAs, Qwest has generally limited CLECs to submitting five collocation applications per week if the CLEC wants Qwest to meet the collocation provisioning intervals Qwest has created.[88] Section 8.4.1.9 of Qwest's SGAT contains different language, which states:

> 8.4.1.9 Should Qwest receive an extraordinary number of complex collocation applications within a limited time frame, Qwest shall use its best efforts to meet the intervals called for in this agreement. If Qwest nevertheless fails to meet such intervals, Qwest must demonstrate to the Commission that such failures were due solely to the fact that Qwest received an extraordinary number of complex collocation applications within a limited time frame.

64. AT&T maintains that this language was taken out of context from an FCC statement that reads in full:

> An incumbent LEC must perform essentially three groups of tasks in order to provision collocation space in response to a competitive LEC's request. The incumbent LEC must determine whether the competitive LEC's application for collocation space meets any requirements the incumbent has established for such applications. In the Advanced Services First Report and Order, we stated that ten days constitutes a reasonable period within which an incumbent LEC should inform a new entrant whether its collocation application has been accepted or denied. Based on the record before us, we believe that an incumbent LEC has had ample time since the enactment of section 251(c)(6) to develop internal procedures sufficient to meet this deadline, absent the receipt of an <u>extraordinary number of complex collocation</u> applications within a limited time frame.[89]

65. Qwest's witness on collocation was repeatedly asked what would constitute an extraordinary number of collocations and what constituted a limited time frame. Neither question was answered with any specificity.[90] Even so, there is no compelling reason to preclude adoption of Qwest's proposed language in the SGAT. The parties to an interconnection agreement can negotiate a different provision, or adopt the five applications per week standard of the FTTH and Arizona Dial Tone ICAs. With the FCC's exception from the installation interval for extraordinary numbers of complex collocation applications within a limited time frame, there is no basis for rejectingSGAT § 8.4.1.9. That provision merely paraphrases the FCC exception. The Commission could consider precluding the application of the exception in instances where the CLEC has forecasted the collocation applications. This would establish a bright line standard to guide Qwest and the CLECs when the purported reason for the provision, addressing unforeseen demands for collocation, has been met by detailed advanced warning of those collocation needs. A similar bright line standard could be applied by the Commission by precluding the use of SGAT § 8.4.1.9 where the

collocation request "augments" an existing collocation arrangement.[91] The undisputed testimony in the record demonstrates that such work has never been complex, within the meaning of the FCC's exception.

Individual Case Basis Pricing for Remote and Adjacent Collocation.

66. Rates for remote collocation were addressed and resolved in the companion cost docket.[92] Qwest has indicated that the rates ultimately ordered by the Commission will be included in the revised SGAT.[93] AT&T objects to individual case basis (ICB) pricing identified in the SGAT for adjacent collocation. This option can be used where the preferred collocation premises have insufficient space available. The collocation would occur "adjacent" to the preferred premises in, for example, existing controlled environmental vaults, controlled environmental huts and in other locations on property owned, leased or controlled by Qwest.[94] The ICB pricing is criticized by AT&T as inefficient and discriminatory against the CLEC in both pricing and time to completion.[95] AT&T's alternative to ICB pricing is to conduct a cost study for adjacent collocation.

67. Qwest notes that there have been no requests for adjacent collocation and no instances where space in has been exhausted for physical collocation, not just in Minnesota, but in Qwest's entire 14-state region.[96] The demand for collocation has fallen, due to economic factors. Qwest maintains that the expense of performing a cost study for a collocation option that is not currently used and not likely to be used within the foreseeable future is unreasonable. No party has demonstrated any imminent need for a pricing study of adjacent collocation. Qwest has demonstrated by a preponderance of the evidence that ICB pricing for adjacent collocation is consistent with Qwest's obligation to provide interconnection under §271 (c)(2)(B)(1).

Adjacent Off-site Collocation.

68. The Department of Commerce asserted that Qwest continues to refuse to negotiate adjacent off-site collocation with Eschelon. Qwest responded that this manner of interconnection is not within the meaning of collocation as defined by the FCC. Qwest's position is not unreasonable, given the wording of 47 C.F.R. § 51.323(k)(3).[97] Qwest should not be required to offer this option as a condition of Section 271 approval until the FCC states that adjacent off-site collocation is within the statutory definition and that ILECs must offer this option for interconnection.

69. Qwest's refusal to negotiate terms, conditions and rates for adjacent offsite collocation raises another question, however. ILECs are obligated to interconnect at any feasible point in the network. The Department of Commerce has cited BellSouth as an example of an ILEC that has an adjacent off-site collocation option. Clearly the technology is feasible. Qwest therefore has an obligation to negotiate terms, conditions, and rates for this interconnection option, once this option is requested by a CLEC. Failure to do so can result in the sort of complexity, uncertainty, cost, and delay that harms the competition that the Act seeks to foster. The Department also notes that this option may become important if competition does thrive and space

in Qwest premises becomes exhausted.[98] While that outcome is not likely anytime soon, Qwest is obligated to negotiate requests for interconnection. Qwest must recognize its obligation to negotiate adjacent off-site collocation, once that interconnection option is requested, as a condition of receiving Section 271 approval.

Channel Regeneration Compensation.

70. AT&T and Qwest disagreed over the propriety of charging CLECs for channel regeneration. Channel regeneration is needed where the CLEC's point of termination bay and the ILEC's cross-connection exceed a certain distance (which varies by the type of facility connected).[99] AT&T maintained that an ILEC has an incentive to place collocated equipment above that distance to require the CLEC to pay for channel regeneration. Qwest disputed this contention, maintaining that the ICAs already obligate placement of collocated equipment at the nearest available point to the cross-connection. AT&T and Qwest agreed to add SGAT § 8.3.1.9 which states:

> Channel Regeneration Charge. Channel Regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network. If based on the ANSI Standard for cable distance limitation limitations [*sic*], regeneration would not be required but is specifically requested by CLEC, then the Channel Regeneration Charge would apply. Cable distance limitations are based on ANSI Standard T1.102-1993 "Digital Hierarchy— Electrical Interface; Annex B."[100]

71. The agreed language places the incentives in the proper places to ensure that placement of the point of termination bay in a location that would require channel regeneration is not used to burden CLECs unduly.

LIS Termination at an ICDF Collocation.

72. Interconnection Distribution Frame ("ICDF") Collocation uses a passive cross-connect device not designed or provisioned for equipment requiring electronics. ICDF allows CLECS to obtain access to combine UNEs with each other and ancillary services without the need to collocate equipment. The Department of Commerce asserted that Local Interconnection Service ("LIS") termination should be afforded at the ICDF.

73. Qwest altered ICDF through the change management process ("CMP") to allow the current ICDF collocation product to include LIS termination at an ICDF Collocation. Therefore, this issue has been resolved since Qwest now allows LIS at ICDF.[101]

VII. CHECKLIST ITEM 2 – UNBUNDLED NETWORK ELEMENTS.

74. Checklist Item 2 requires that Qwest demonstrate that it is providing nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). The focus of the requirements under §251(c)(3) impose upon Qwest, as an incumbent LEC, the following obligation:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[102]

New Construction as Access to UNEs.

75. AT&T asserts that the nondiscrimination provisions of the Act requiring ILECs to provide access to UNEs "on rates, terms and conditions that are just, reasonable, and nondiscriminatory"[103] applies to new construction done at the request of the CLEC. Qwest currently constructs facilities for customers requesting service under the terms and conditions established in its federal and state tariffs. Qwest's ICAs provide that Qwest may refuse to provide service to a requesting CLEC if no facilities are available except under narrow conditions that do not apply to Qwest's other customers.[104] The ICAs allow Qwest to refuse to construct a facility as a UNE for a CLEC when Qwest would be obligated to construct the same facility as part of a tariffed service. Qwest offers CLECs the opportunity to request special construction, but evaluates a CLEC's request differently than Qwest evaluates an end-user customer's request for construction of comparable facilities.

76. Qwest responded that the FCC has held that an incumbent's obligation to unbundle facilities applies only to an ILEC's existing network. The FCC has stated:

> [W]e conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, *where such interoffice facilities exist*.[105]

77. The FCC's *Local Competition Order* was reviewed by the Eighth Circuit Court of Appeals.[106] In *Iowa Utilities Board v. FCC*, the Eighth Circuit held:

> subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network–*not to a yet unbuilt superior one*."[107]

78. The FCC revisited this issue in the *UNE Remand Order*, stating:

> In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, *we do not require*

incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[108]

79. A contrary position was taken by the Washington Utilities and Transportation Commission, which stated:

> We believe the term "existing network" is not meant to be taken literally, and that the FCC contemplated the kind of planning and building addressed in this issue as being encompassed in the "existing network." This is borne out by the FCC's orders and the Eighth Circuit's opinion in *Iowa Utilities Board v. FCC* . . . .
>
> * * *
>
> In requiring Qwest to provide facilities to CLECs in areas that are already served by like facilities used to full capacity, we simply require Qwest to treat CLECs no differently than it would treat a retail customer requesting such facilities.[109]

80. It is inappropriate to adopt the "Washington analysis" on this issue. CLECs are wholesale customers, not retail customers. There is no discrimination in treating disparate groups differently when rational grounds exist for the different treatment. The FCC has indicated that it will address new build obligations in its triennial UNE review.[110] Any policy change, particularly given the express statements of the Act, the FCC, and the Eighth Circuit, should await the triennial UNE review.

81. AT&T's position attempts to apply the carrier of last resort obligations of the ILEC to the unbundling obligations imposed by the Act. This position ignores the frequently stated policy preference of the FCC for facilities-based competition. Imposing a build requirement on the ILEC would place the risk of not recovering the investment on the ILEC.

82. AT&T has asserted that there is no risk of nonrecovery because pricing already includes the use of a "fill factor." In pricing, the fill factor is used to reflect the normal process of building new facilities with excess capacity that is reasonably anticipated to be used over the life of the facility. AT&T asserts that this practice means that the new costs for construction are already accounted for in the prices paid for UNEs. Constructing facilities in this fashion recognizes that no prudent ILEC would build new facilities that are immediately exhausted. CLECs obtain the benefit of fill factors by having access to this excess capacity when Qwest chooses to expand its network. By contrast, CLEC build requests impose a specific, and potentially substantial burden on the ILEC that need not bear any relation to reasonably anticipated customer demand. The CLEC, under AT&T's proposal, is only obligated to purchase the newly-built UNEs for as long as the CLEC has customers for those UNEs. AT&T has not indicated why the ILEC should bear the risk of overcapacity for the benefit of a

CLEC. When existing facilities are exhausted or have reached capacity, there is nothing left to unbundle and Qwest has no unbundling obligation to satisfy.

Adding Equipment for Access to UNEs.

83. A similar issue is presented by AT&T's assertion that the unbundling requirement extends to Qwest upgrading electronics and lighting dark fiber at the request of the CLEC.[111] Qwest indicates that such requests are provided for at § 9.1.2.3 of its SGAT, where Qwest is obligated to perform incremental facility work, including adding cards to existing electronics. Qwest asserts that the augmentation sought by AT&T would extend to adding electronics such as "a multiplexing unit (costing $36,880 per node) to a digital cross-connect device (costing in excess of $1,000,000 to install)."[112] AT&T maintains that Qwest exaggerates the relevant costs and that CLECs are compensating Qwest for these costs in the TELRIC rates CLECs pay for UNEs.[113]

84. Qwest cites the FCC's ruling approving Verizon's 271 Application in Pennsylvania as demonstrating that AT&T's request goes beyond the scope of Section 271 proceedings.[114] In that matter, CLECs objected to Verizon's refusal to "provide high capacity loops as unbundled network elements *unless* all necessary equipment and electronics are present on the line and at the customer's premises."[115] The FCC held that Verizon was not obligated to augment high capacity loops to provide all necessary equipment to comply with the competitive checklist.[116] AT&T has not demonstrated that the Commission should vary from the FCC's holding regarding augmenting electronics when unbundling high capacity loops.

Requiring the Lighting of Dark Fiber as Access to UNEs.

85. The same analysis for augmenting electronics applies to lighting dark fiber. When a CLEC requests unbundled dark fiber (UDF), the CLEC is entitled to place equipment that will light the fiber. The FCC has described the obligations of CLECs obtaining UDF as, "[t]he [CLEC] leasing the fiber is expected to put its own electronics and signals on the fiber . . . ."[117] CLECs have the option of placing electronics and lighting the UDF or request that Qwest do so pursuant to SGAT § 9.19 (governing reimbursement for Qwest's construction of new facilities).[118] AT&T has not demonstrated that the Commission should vary from the FCC's holding regarding the CLEC's obligation to light UDF.

Qwest's UNE-Star Offering.

86. UNE-Platform ("UNE-P") refers to a standard combination of unbundled network elements, including an unbundled loop, unbundled local switching, and interoffice transport, that is offered on a wholesale basis to CLECs. The UNE-P arrangement is the archetype of the UNE combinations that all ILECs, including Qwest, must provide pursuant to the FCC's unbundling rules.[119] An ILEC ordinarily provisions UNE-P using the same network elements and functionalities that it uses to serve a retail basic exchange customer of the same class (*e.g.*, residence, business, Centrex). Where the end user is already served by the ILEC as a retail customer, the underlying

network element arrangements are left in place.[120] Different types of UNE-P arrangements parallel the ILEC's different retail exchange services. Qwest identifies the following types of UNE-P: UNE-P-POTS, for residential or business end users; UNE-P ISDN-BRI and ISDN-PRI; UNE-P DSS (digital switched service); UNE-P PBX; and UNE-P Centrex.[121]

87. Because UNE-P parallels Qwest's own offerings, UNE-P is also similar to a resold service. The differences are in pricing, obtaining compensation for origination and termination of toll calls from interexchange carriers ("IXCs") over switched access, and obtaining voice mail. Resold services are priced at a discount from Qwest's retail rate. By contrast, UNE-P is priced at the sum of the prices of the network elements within the UNE combination. The prices for the individual UNEs must be cost-based, using costs developed according to the total element long run incremental cost ("TELRIC") methodology.[122] CLECs using UNE-P are entitled to charge IXCs for switched access. These charges can be substantial. With resold services, these charges are retained by Qwest.[123]

88. The third difference is voicemail (known as Voice Messaging Service or VMS by Qwest). Qwest maintains that, because VMS is not an unbundled network element and it is not a vertical switch feature, no FCC rule or order requires that Qwest provide VMS with UNE-P combinations.[124] The CLEC Coalition disputes this characterization of voicemail as a resold feature and maintains that including VMS with a UNE-P offering obligates Qwest to provide the feature on a nondiscriminatory basis.

89. The two largest CLECs in Minnesota (measured by number of lines) are McLeod and Eschelon. Both of these CLECs sought to migrate their existing resale lines to UNE-P. Eschelon began preparing to order Qwest UNE-P lines in approximately mid-May of 2000.[125] Eschelon began to test the availability of UNE-P features and Uniform Service Ordering Codes ("USOCs") from Qwest by placing trial orders, using Eschelon employee lines, in Minnesota.[126] Eschelon experienced complete outages, with no dial tone, for a day or more; inability to call out locally; inability to place long distance calls; loss of features; and inability to forward calls between central offices.[127] This experience in testing led Eschelon to conclude that a competitive local service could not be based on Qwest's UNE-P because, "although Eschelon had a contractual right to the lower prices and the access payments [available with UNE-P], it found that the UNE-P combination was not, as a practical matter, available from Qwest at an acceptable level of quality."[128]

90. Qwest offered an alternative platform service known as "UNE-Star" to Eschelon and McLeod.[129] Eschelon executed an amendment to its interconnection agreement with Qwest on November 15, 2000. Eschelon then began ordering UNE-Star lines, many of which were conversions of existing resale customers to UNE-Star.[130] Qwest represented to Eschelon that UNE-Star would give Eschelon the benefits of UNE-P's lower, TELRIC-based pricing relative to resale, and would allow Eschelon to collect switched access revenue that was not available on a resale line.[131] Qwest told Eschelon that Eschelon's base of resale customers would be moved to UNE-Star, without the need for individual LSRs from Eschelon and without adverse

customer impact.[132] Until that occurred, however, Qwest told Eschelon to order UNE-Star through the existing resale process, and to accept bills created through existing resale billing process.[133] Qwest said that it would then compare the end-of-month billed revenues (based on resale prices) to the lower UNE-Star rates and pay Eschelon the difference.[134] Qwest made similar representations in discussions with McLeod to convince that CLEC to adopt UNE-M.[135] Eschelon agreed, under the presumption that these were short-term accommodations and that Qwest would develop and apply accurate UNE-Star ordering and billing procedures with a matter of months.[136] Neither Eschelon nor McLeod received the UNE-P services Qwest had assured them would be developed. Both Eschelon and McLeod continued to add customer lines using UNE-Star at least through November 2001.

91. Qwest indicated that it had assembled a "UNE-Star Implementation Team" to develop it into a permanent, fully-functioning product, but UNE-Star has never been formalized as an offering to other CLECs.[137] UNE-Star is a non-standard arrangement with poorly implemented procedures, bypassing Qwest's standard and documented processes.[138] The product remains undefined and ambiguous. Robert Stright, who headed the Liberty Consulting performance measure audit and data reconciliation processes, testified at hearing that "I don't know what UNE-Star is" and that UNE-M and UNE-E are "terms I'm not familiar with.[139] Qwest offered testimony in the UNE costs/pricing 271 docket (PUC Docket No. P-421/CI-01-1375) stating that "we don't have a product anywhere called UNE-Star."[140] Eschelon personnel have experienced confusion in using UNE-Star, due to the limited documentation available to Qwest personnel for the product.[141]

92. Qwest billed UNE-Star under a system that demonstrates the resale nature of the product.[142] Each month, Qwest prepared and sent bills for UNE-Star to McLeod and Eschelon showing charges due based upon resale prices for those lines.[143] These rates are significantly higher than Qwest's authorized rates for UNE-P. Under the UNE-Star arrangement, McLeod and Eschelon are required to pay the full amount shown on those bills.[144] Lori Deutmeyer, Local Line Cost Manager for McLeod, testified that "Qwest has never invoiced McLeodUSA for the correct amount for any of its UNE Star purchases."[145] The Qwest's billing method was described by Ms. Deutmeyer as submitting to McLeod a resale bill and then McLeod billing Qwest for the discount.[146] Only the resale billing was automated.

93. Ellen Copley, Manager of Cost and Revenue Analysisfor Eschelon, testified that "One hundred percent of the UNE-E rates billed to Eschelon from Qwest for UNE-E lines are inaccurate."[147] Copley described a process for manually truing-up the Qwest bill similar to the method used by McLeod.[148]

94. Qwest supplied Eschelon and McLeod with a reconciliation spreadsheet that calculates the billing adjustment to be refunded back to each CLEC.[149] The amounts of these refunds are sizeable.[150] Discovery of errors in the reconciliation statement led to negotiation for a further true-up in the billing.[151] Neither the initial reconciliation, nor any subsequent true-up due to errors in billing are reported as billing inaccuracies in any billing performance indicator.

95. During the hearing in this docket, Qwest contended that its UNE-Star billing practices are not evidence of discrimination against CLECs, because Eschelon and McLeod "agreed" to do it this way.[152] The agreement between Qwest and the two CLECs was for a short-term, interim measure, not a methodology that would last for the entire existence of the product. More importantly, the demonstration that Qwest must make for Section 271 approval is that its practices are nondiscriminatory and capable of providing CLECs with a meaningful opportunity to compete. The FCC has held that due to the critical connection between collecting revenue and staying in business, "Accurate and timely wholesale bills . . . thus represent a crucial component of OSS."[153]

96. CLECs using UNE-P are entitled to bill IXCs for switched access toll calls. This means that the ILEC must provide the relevant data regarding such calls to the CLEC for each UNE-P line served by the CLEC. For switched access toll calls, the IXC and length of call are compiled electronically in daily usage files (DUF). Qwest provides the DUF to the CLEC and the CLEC bills the IXC. Qwest indicated that Eschelon was not supplied with DUF records for UNE-E, but rather Eschelon would provide Qwest with a list of all of the working telephone numbers ("WTNs") associated with its UNE-Star lines. Qwest would take that list and manually extract the usage records associated with those WTNs from its usage databases.[154] The process described by Qwest to provide Eschelon with switched access records did not utilize DUF processing. According to Mr. Zimmerman, "[t]his was necessary **because these lines would continue to be shown as resale lines**, and Qwest's DUF does not provide switched access records on resale lines."[155]

97. Up to early 2002, Qwest's UNE-P product offering failed to meet the quality standard needed to support competition by CLECs in commercial volumes. Qwest appears to have recognized this fact, since the UNE-M product was expressly marketed to McLeod as providing the advantages of UNE-P without significant barriers that exist in the UNE-P conversion process.[156] Eschelon chose UNE-E after finding that Qwest's standard UNE-P offered to CLECs proved unreliable to implement.[157] Despite the resale nature of UNE-Star, Qwest has characterized that product throughout portions of the Minnesota Section 271 dockets as a type of UNE-P. Because of Qwest's reliance on UNE-Star as its unbundled network element product to the two largest CLECs in Minnesota, it is found that Qwest has **not** met the requirement of checklist item 2 that an ILEC:

> [D]emonstrate that it is providing access or interconnection pursuant to the terms of that checklist item. The Commission has previously concluded that, to establish that it is "providing" a checklist item, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement or agreements that set forth prices and other terms and conditions for each checklist item, **and that it is currently furnishing, or is ready to furnish, the checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality**.[158]

98. Qwest relied extensively on UNE-Star as a substitute for providing UNE-P in “commercial volume” quantities. The numbers of lines and percentages of UNE-P POTS, UNE-P Centrex, UNE-Star POTS, and UNE-Star Centrex are set out in the Appendix to this Report.[159]

99. The manual process that Qwest devised to allow Eschelon to bill IXCs for switched access charges also demonstrates that the only UNE-P offering by Qwest that was intended to serve CLECs “in the quantities that competitors may reasonably demand”[160] was incapable of providing mechanized billing information under the normal process for UNE-P.

100. The current status of UNE-M is unclear from the record in this matter. UNE-E is, as of May 28, 2002, the pricing methodology for almost 40% of Eschelon’s lines in Minnesota.[161] The record in this matter shows that Qwest has relied heavily on the UNE-Star product in attempting to show that UNE-P is available to CLECs in Minnesota. The record in this matter demonstrates conclusively that UNE-Star does not meet the standards for a UNE-P offering (particularly with respect to billing accuracy, discussed below). It is appropriate that Qwest’s application for Section 271 approval should not be approved until Qwest has demonstrated that all UNE-Star lines have been converted to UNE-P and that Qwest’s performance in billing for those lines meets the established standards for UNE-P billing.

101. Significant portions of the interconnection agreements for UNE-M and UNE-E were not filed with the Commission.[162] This conduct prevented other CLECs from selecting particular aspects of those interconnection agreements for inclusion in their own ICAs (through a process known as “pick and choose”). The UNE-Star product was never formalized as a UNE-P offering that could be selected for use by CLECs other than Eschelon and McLeod. These facts demonstrate the Qwest failed to offer the “nondiscriminatory access” to UNE-P (as Qwest describes UNE-Star) that is explicitly required by checklist item 2.[163]

102. The Department of Commerce and the CLEC Coalition raised access to voice messaging services as another aspect of the unfiled agreements that demonstrated discrimination by Qwest in the terms and conditions of interconnection offered to CLECs. The FCC has not required voice messaging be offered as a UNE (apparently finding that it is more akin to an information service than a telecommunications service). Qwest stated its position on the issue of discriminatory access to voice messaging as follows:

> Nevertheless, Qwest has voluntarily made Qwest’s voice messaging service (“VMS”) available with UNE-P combinations in the agreements between Qwest and McLeod and Qwest and Eschelon, pursuant to the terms and conditions of those agreements. The CLEC Coalition incorrectly claims that Qwest provides discriminatory access to VMS with UNE-P combination services because it does not make this same arrangement available to other CLECs providing UNE-P services under different terms and conditions. Mr. Burns’ assertion is not correct. Qwest’s agreements

are not discriminatory. **Any Minnesota CLEC that wishes to provide Qwest's VMS with UNE-P combination services may do so, so long as it employees [*sic*] the same terms and conditions that apply to McLeod and Eschelon.** Mr. Burns concedes that when USLink requested VMS through interconnection agreement negotiations, Qwest agreed to provide the service. USLink did not like the terms offered by Qwest and opted not to accept them. This proceeding is not the appropriate forum for USLink to seek more favorable terms with Qwest.[164]

103. As discussed in foregoing findings, Qwest included voice messaging in ICAs that were not filed with the Commission. The pricing arrangements in those ICAs provided a substantial price discount for the services obtained (including voice messaging).[165] Those ICAs and accompanying discounts were never made available to other CLECs. Offering a service, without offering the same pricing, constitutes discrimination. Qwest discriminated in favor of Eschelon and McLeod and against all other CLECs in Minnesota during the period that these unfiled agreements were in force.

Access to Vertical Switch Features.

104. The CLEC Coalition maintains that Qwest fails to provide local switch port features with UNE-P combinations, and that CLECs have difficulty obtaining switch port features.[166] The only identified instance of this failure involves U S Link, which has a unique technical situation discussed in the following finding. Qwest asserts that all vertical switch features that are available to Qwest retail operations are also available with UNE-P combinations. Qwest notes that in the FTTH and Arizona Dial Tone ICAs, Qwest is obligated to provide to CLECs, via UNE-P combination service, all features that are available with a comparable Qwest retail service.[167]

105. The one CLEC with a vertical switch problem is U S Link. Qwest notes that it is working with the CLEC on an on-going basis to resolve its carrier-specific issue.[168] One technical issue does not demonstrate a lack of access to vertical switch features. Qwest has shown that the uniform service order codes ("USOCs") needed to select these features are made available and that Qwest provisions lines with these features in accordance with its ICAs.

Emerging Services.

106. Qwest acknowledges that it has an obligation to provide emerging services as UNEs arising out the FCC's UNE Remand and Line Sharing orders.[169] Worldcom maintains that Qwest is attempting to avoid that obligation by blurring the distinction between emerging services and "services" generally (which need not be offered as UNEs). Packet switching is identified as one such emerging service that has inappropriate limits attached in Qwest's ICAs.

107. Packet switching is the functionality that allows a carrier to provide DSL capability. Rather than providing a continuous stream or signal over a dedicated wire,

packet switching sends a message in bursts or “packets” along several alternative routes. This allows for maximum speed in transmission of the message. Digital subscriber line access multiplexers (DSLAMs) are part of the electronics required to handle packet switching. In its *UNE Remand* Order, the FCC required ILECs, such as Qwest, to unbundle packet switching in those circumstances where:

> (1) the ILEC has deployed a digital loop carrier system ("DLC"),
>
> (2) there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer,
>
> (3) the ILEC has not permitted the requesting CLEC to collocate its DSLAM at the remote terminal, and
>
> (4) the ILEC has deployed packet switching capability for its own use.[170]

108. Qwest copied the FCC rule word- for-word into the FTTH Agreement and SGAT at § 9.20.2.1.2. AT&T maintains that Qwest’s obligation to unbundle packet switching extends to DSLAMs (even where collocation is not precluded), since failing to do so renders the provision of xDSL services “economically infeasible.”[171] The Texas Arbitration Order relied upon by AT&T to support this argument developed a record to support the conclusion that is absent in this proceeding. Qwest has demonstrated that is has a concrete legal obligation to unbundle DSLAMs to the extent required by the FCC. There is no basis for requiring Qwest to extend its unbundling obligation to areas where xDSL provisioning by CLECs is “economically infeasible.”

109. AT&T also maintains that the provisioning of copper loops for CLECs is discriminatory where the CLEC must rely on “home run” copper, rather than installations that afford intermediate electronics. Qwest points out that its own installation of a DSLAM will only occur when the loop is capable of supporting xDSL. AT&T’s concern appears to be directed toward technologies that are not yet implemented in Minnesota. These concerns are appropriately considered by the FCC on their own merits, when they arise in actual use for the provisioning of DSL service.

Requiring ICDF Collocation for Dark Fiber Route Combination.

110. The CLEC Coalition asserts that the SGATs require a CLEC to establish an Interconnection Distribution Frame (ICDF) collocation or other form of collocation, as a precondition to combining unbundled network elements, such as two CLEC dark fiber routes obtained from Qwest.[172] This requirement is, in the CLEC Coalition's opinion, impermissible under an order of the FCC and inconsistent with the Minnesota Commission’s ruling on a 2001 complaint brought by Desktop Media against Qwest. The CLEC Coalition asserts that this requirement imposes substantial delays and increased costs to CLECs.

111. The FCC ruled that incumbent LECs cannot require intermediate interconnection arrangements, such as an ICDF collocation, where a direct

connection is possible. In adopting rules governing advanced telecommunications capability, the FCC stated:

> Incumbent LECs may not require competitors to use an intermediate interconnection arrangement in lieu of a direct connection to the incumbent's network if technically feasible, because such intermediate points of interconnection simply increase collocation costs without a concomitant benefit to incumbents.[173]

112. The FCC's approach in the *Qwest Nine State Order* is to leave matters more properly addressed in an enforcement action to be resolved in such actions.[174] The issue described by the CLEC Coalition is more appropriately resolved in an enforcement action.

Equal Access to UNEs Between CLECs and Qwest.

113. Worldcom asserts that the definition of "non discrimination" as set forth in the Arizona Dialtone ICA, is contrary to the meaning ascribed by the Act and the FCC. The impact of that definition as described by Qwest's witness is that:

> Access to UNEs, as well as the quality of the UNEs, is provided on a nondiscriminatory basis *as between CLECs*.
>
> * * *
>
> Qwest provides the same quality of and access to UNE-P combinations to all CLECs requesting access. [175]

114. The quoted language suggests that a distinction may exist between the quality of and access to UNEs by CLECs compared to the quality and access to UNEs Qwest provides to itself. Qwest responded that its concrete legal obligation has been incorporated into its interconnection agreements and its proposed SGAT, which provides at Section 9.23.3.1:

> Qwest shall provide non-discriminatory access to Unbundled Network Elements on rates, terms and conditions that are nondiscriminatory, just and reasonable. The quality of an Unbundled Network Element Qwest provides, as well as the access provided to that element, will be equal between all carriers requesting access to that element; second, [*sic*] where technically feasible, the access and Unbundled Network Element provided by Qwest will be provided in "substantially the same time and manner" to that which Qwest provides to itself of [*sic*] its affiliates. In those situations where Qwest does not provide access to network elements to itself, Qwest will provide access in a manner that provides CLEC with a meaningful opportunity to compete.[176]

115. Worldcom maintains that the SGAT language is insufficiently detailed to demonstrate that Qwest actually meets the nondiscrimination requirements of the Act. The purpose of the SGAT language is to set out the standard that Qwest must meet for future access to UNEs. Worldcom has failed to demonstrate that there is any problem with Qwest's SGAT language. Qwest's restatement of its obligation to meet the Act's nondiscrimination requirement does not constitute a violation of the Act.

Access to Affiliate-Controlled Facilities and Dark Fiber.

116. AT&T maintains that the relationships between Qwest affiliates allow for the avoidance of the unbundling requirement of UDF and other facilities by transferring them between affiliates.[177] Qwest denied that there were any assets available to QC (the BOC) that were available for unbundling.[178] The testimony of Qwest's witness was substantially contradicted by later announcements by Qwest regarding its earlier accounting treatment of optical capacity sales.[179]

117. This argument was considered by the FCC in the *Qwest Nine State Order*. The FCC stated:

> On the basis of the record before us, we do not find QCC or any other Qwest affiliate to be a successor or assign of QC, and therefore Qwest is not discriminating in denying unbundled access to affiliate-owned facilities. Qwest affirms that QC has not transferred any assets to any affiliate, that no affiliate of QC has continued QC's business without interruption or substantial change, and that no affiliate of QC has stepped into the shoes of QC. AT&T notes that the Colorado Commission has directed Qwest to amend its SGAT to offer unbundled access to any QCC dark fiber to which QC has access rights, out of concern about the parent's access to the affiliate's dark fiber. Nonetheless, AT&T does not suggest that the Colorado Commission found QCC to be a successor or assign of QC, or that Qwest had failed to meet its unbundling obligations under section 251(c)(3). Based on the foregoing, then, we find no evidence in the record that warrants a finding of checklist noncompliance in this area.[180]

118. There is no reason in this proceeding to deviate from the FCC's resolution of this issue in the *Qwest Nine State Order*. The Commission may wish to consider including the Colorado SGAT language described by the FCC as a further means of ensuring access to facilities or to UDF by CLECs.

VIII. CHECKLIST ITEM 4 – LOCAL LOOP TRANSMISSION.

119. Item 4 of the competitive checklist requires that a BOC provide local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. The FCC has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types

of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[181]

120. In order to establish that it is providing unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops, including any functionality of the loop requested by a competing carrier, unless it is not technically feasible to condition the loop facility to support the particular functionality requested.[182] In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

DS-1 Loop Installation Intervals.

121. AT&T contends that Qwest's standard intervals for DS-1 loops are discriminatory and are too long to provide CLECs with a meaningful opportunity to compete. Qwest's intervals for DS-1 Loops as set forth in the FTTH Agreement are as follows:

> Established Service Intervals for existing DS-1 Capable Loops, DS1 Capable Feeder Loop, 2-Wire Analog Distribution Loop:

a)	1 – 24 lines	9 business days
b)	25 or More	ICB

These same standard intervals appear in Qwest's current Service Interval Guide ("SIG") - Exhibit C to the Minnesota SGAT.

122. In Minnesota, Qwest is obligated to install DS-1 loops at intervals that are currently specified in the Joint Stipulation and Agreement in the Qwest-U S WEST Merger proceedings ("Merger Stipulation").[183] The DS-1 intervals set forth in the Merger Stipulation are as follows:[184]

1 – 8 lines	5 business days in high density zones 8 business days in low density zones
9 – 16 lines	6 business days in high density zones 9 business days in low density zones
17 – 24 lines	7 business days in high density zones 10 business days in low density zones
25 or More	ICB

123. Qwest did not include these intervals in the Minnesota ICAs or the current Minnesota SGAT. The DS-1 intervals in the Merger Stipulation expire on the earlier of the adoption of Commission-approved carrier-to-carrier wholesale service standards or December 31, 2002. Since carrier-to-carrier wholesale service standards have not been established, to date, Qwest's commitment to provision DS-1s under the intervals in the Merger Stipulation expired as of December 31, 2002. Qwest has declined to amend the SGAT to include these intervals.[185] Therefore, as of January 1, 2003, it is Qwest's position that the only DS-1 intervals that will be available to CLECs are those set forth in the two Minnesota ICAs and the Minnesota SGAT and that these are the appropriate intervals because they are at parity with Qwest's retail intervals.

124. The language of the Minnesota ICAs and the current Minnesota SGAT do not conform to the Merger Stipulation. During the Section 271 workshops in other jurisdictions, Qwest initially proposed the same intervals contained in the Merger Stipulation; it later lengthened the proposed standard intervals without the approval or agreement of the ROC participants. During 2001, Qwest also lengthened the intervals offered to its retail customers to correspond with the proposed wholesale intervals.[186] Qwest now maintains that because the wholesale and retail intervals are the same, it provides service at parity.

125. The wholesale intervals established in the Merger Stipulation are reasonable and allow competitors a meaningful opportunity to compete. Qwest cannot make them unreasonable by lengthening the intervals for provision of retail service. In order to comply with Checklist Item 4, Qwest should be required to modify its current Minnesota SGAT to reflect the current merger intervals for DS-1s. Qwest has been required to make similar revisions by state commissions in Arizona,[187] Washington,[188] and New Mexico.[189]

Repair Intervals for Basic 2-Wire Analog Loops.

126. The Minnesota ICAs and the SGAT all provide that Qwest's repair intervals for Basic 2-Wire Analog Loops are as follows:

Established Repair Intervals for Basic 2-wire Analog Loops, Line Sharing and Line Splitting:

24 Hours OSS
48 Hours AS

The negotiated PIDs are similarly based on a 24-hour interval. For its retail customers, Qwest's mean time to restore service is in the range of 7 to 14 hours, with and without dispatch.[190] Qwest's average wholesale mean time to restore service is in the range of 6 to 8 hours.[191]

127. AT&T contends that the 24-hour interval is too long, is not at parity with Qwest's retail performance and will impair the CLECs' ability to comply with Minnesota's

service quality rules, based largely on the argument that AT&T will not be able to comply with a 24-hour repair interval itself if Qwest takes close to 24 hours to complete repairs. Because Qwest would be under no obligation to continue to perform at current levels, AT&T contends that Qwest's actual performance is not relevant.

128. Qwest's actual performance is relevant in determining whether Qwest is providing nondiscriminatory access to unbundled loops. If there were any suggestion in the evidence that Qwest was performing at a level that had the effect of disadvantaging CLECs in the marketplace, whether it met the PIDs for repair intervals or not, some change might be justified. There is no evidence here that Qwest is doing so. The repair intervals for two-wire analog loops contained in the ICA and the SGAT are reasonable as stated. Qwest need not shorten them to comply with Checklist Item 4.

Loops Provisioned on IDLC.

129. As noted above, a BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.[192] AT&T and the CLEC Coalition maintain that when CLECs order basic installation in a community served by IDLC they have encountered a high percentage of customer disconnects before the service is successfully ported to the CLEC.[193] These problems are not recent but date back some time ago. Qwest has provisioned 29,227 ISDN circuits in Minnesota between CLECs and Qwest retail customers, with approximately 13.7% of those working on Integrated or Universal DLC.[194]

130. In response to these difficulties, Qwest modified § 9.2.2.2.1 of the FTTH agreement and the SGAT to provide as follows:

> If Qwest uses Integrated Digital Loop Carrier (IDLC) systems to provide the Local Loop, Qwest will first attempt, to the extent possible, to make alternate arrangements such as Line and Station Transfers (LST), to permit CLEC to obtain a contiguous copper Unbundled Loop. If a LST is not available, Qwest may also seek alternatives such as Integrated Network Access (INA), hair pinning, or placement of a Central Office terminal, to permit CLEC to obtain an Unbundled Loop. If no such facilities are available, Qwest will make every feasible effort to unbundle the IDLC in order to provide the Unbundled Loop for CLEC.

131. Qwest also agreed to make other changes that it believed resolved the issue with AT&T:

> In addition, Qwest has altered its position that hair pinning would be limited to 3 loops per central office and agreed to provision more than the three loops per central office on an interim basis. Qwest also stated that a decision would be made to place a Central Office terminal when the number of hair pinned loops exceeds three loops.[195]

132. If these changes are incorporated into the language of § 9.2.2.2.1 of the FTTH agreement and the SGAT, they would resolve the concerns raised by the CLEC Coalition. AT&T maintains that these procedures are still cumbersome and may require too much time, even though AT&T agreed to this language in other 271 proceedings; AT&T essentially argues that this is another reason why pre-order access to loop qualification data is necessary. Those arguments will be separately addressed in the section concerning access to loop qualification data.

133. Qwest should make the changes indicated above to the FTTH agreement and the SGAT in order to comply with Checklist Item 4.

Redesignation of Interoffice Facilities.

134. During the hearing Qwest committed to redesignating spare facility spans between Qwest offices, which Qwest designates as interoffice (IOF) facilities, as loop facilities if Qwest's distribution facilities in that area are at exhaust.[196] This commitment is not currently reflected in the FTTH agreement or the Minnesota SGAT. Qwest should reduce this agreement to writing in § 9.2.14 of the SGAT in order to resolve this issue.

Spectrum Management.

135. Qwest has agreed to incorporate language concerning spectrum management issues in other jurisdictions, and it has done so in § 9.6 of the Minnesota SGAT but not in the FTTH or Arizona Dial Tone Agreements. Qwest's revision of the SGAT language is sufficient to demonstrate its agreement to provide these terms in Minnesota.

Conditioning Charges.

136. In Minnesota, the Commission has determined that the cost of conditioning a loop is fully recovered in the cost of the loop itself and that no additional charge may be imposed for conditioning.[197] Nonetheless, the ICAs and Qwest's current SGAT provide in § 9.2.2.4 that Qwest may assess a nonrecurring charge for conditioning unbundled loops. Although this language is clearly inconsistent with the Commission's Order in the Generic Cost Case, Qwest maintains it is not "inappropriate" because its price list, Exhibit C, and Exhibit A to the SGAT, set the conditioning charge at $0. During the hearing Qwest declined to remove the inconsistent language from the SGAT.[198]

137. In order to comply with Checklist Item 4, Qwest must remove the language from its Minnesota SGAT that permits it to collect a nonrecurring charge for conditioning unbundled loops. The contract language should accurately describe Qwest's obligation when the Commission has specifically addressed this issue.

Line Sharing.

138. The FCC also requires BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL), which is defined as "the

frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions."[199] This definition, commonly called line sharing, applies whether a BOC's voice customers are served by copper or by DLC equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal.[200]

139. In October 1999 the PUC ordered Qwest and CLECs to conduct technical trials to determine the feasibility of line sharing in Minnesota and to develop appropriate terms and conditions. Based on the negotiated terms, the Commission issued its Line Sharing Order on December 3, 1999.[201] Thereafter Qwest developed an interim agreement to govern the deployment of line sharing in its 13 other states, which was finalized April 24, 2000.[202] Qwest has continued to negotiate line sharing under various interconnection agreements.[203] In Minnesota, most carriers are operating under the stipulated agreement.

140. To determine whether a BOC makes line sharing available consistent with FCC rules, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York Order* and the *SWBT Texas Order.* In addition, a BOC should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line-shared loops, including access to loop qualification information and databases.

141. Checklist item 4 also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.[204] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[205]

142. Qwest defines line sharing as the situation occurring when the ILEC (Qwest) provides voice service and a CLEC provides data service over the same line. Line splitting occurs when a CLEC provides voice service *over UNE-P* and a different CLEC provides DSL service over the same line. Loop splitting occurs when a CLEC provides voice service *over an unbundled loop* and a different CLEC provides DSL service over the same loop. EEL splitting is similar to loop splitting, the difference being that the loop has been extended by the addition of dedicated transport. Some parties disagree with certain of these definitions, and their arguments are addressed below.

Loop Splitting Definition.

143. Covad and AT&T contend that Qwest is obligated to provide line splitting on all types of loops and that Qwest fails to comply with Checklist Item 4 because it offers line splitting only for loops provided by the UNE platform. This, in essence, is a disagreement with the way in which Qwest defines line and loop splitting. The ICAs provide for line splitting, loop splitting, EEL splitting, and other requests for "nontraditional" splitting of loops using the Special Request Process (SRP), which is an explicit acknowledgment that Qwest's line sharing and line splitting obligations apply to the entire loop as required by the FCC.[206] The fact that Qwest has chosen to call its products something besides "line splitting" does not affect Qwest's obligation to make the products available to CLECs. Qwest need not redefine its products to comply with Checklist Item 4.

EEL Splitting via the SRP.

144. In addition, AT&T contends that Qwest's failure to offer EEL splitting as a standard process, as opposed to a special request process, is anticompetitive. EEL is a combination of dedicated transport and unbundled loop. The purpose of an EEL is to serve customers via a distant central office. Because DSL is distance-sensitive and is typically limited to loops of 18,000 feet or less, it is unlikely that there will be much demand for EEL splitting. Qwest has received no requests to date for EEL splitting.

145. Qwest has committed to offering EEL splitting as a standard product should the demand for it increase in the future. AT&T has presented no evidence that a standard EEL-splitting product should be required now in order to demonstrate compliance with § 271. Qwest's current process is adequate to meet those requirements.

Installation Interval for Line Shared Loops.

146. Qwest's provisioning interval for line-shared loops is three business days. Covad contends that the interval should be reduced to one or two days, because it needs time on the "back end" of the installation process to perform its own work to deliver xDSL to end-user customers in a competitive manner.

147. Qwest's standard interval for Qwest retail DSL is five business days; however, these intervals are not directly comparable. Qwest has committed to provide retail DSL service to its customer within five days; it has committed to provide line-shared loops to CLECs in three business days. Once the loop is delivered to the CLEC, the CLEC must add the "internet protocol" or IP layer that converts the loop into a DSL service, then provide to the end user the self-installation kit.

148. Qwest's recent performance results show that it has provided line-shared loops in intervals ranging from 2.62 to 3.46 days.[207] Even considering the work that CLECs must do to provide DSL service after delivery of the loop, Qwest's interval of three business days provides CLECs a meaningful opportunity to compete. A reduction in the standard interval is not necessary to achieve compliance with Checklist Item 4.

Installation Interval for Loop Conditioning.

149. Exhibit C to Qwest's SGAT provides for a standard interval of 15 business days when line conditioning is required to provision an unbundled loop. Qwest's most recent performance results show an average installation interval of 3.76 to 12.75 days to deliver conditioned loops to CLECs.[208] Covad contends that, based on Qwest's performance results, the standard interval should be shortened to five to seven business days, and that Qwest's refusal to commit to a shorter interval must mean that it plans to provide substantially poorer service as soon as it receives long-distance authority in Minnesota. Covad has produced no credible evidence that its ability to compete is jeopardized by either the 15-day interval or Qwest's performance thereunder.

150. Qwest has demonstrated its commitment to turning over loops to CLECs as soon as they are complete. Its performance results show that it has required up to 12.75 days to condition loops, but that more often it does so in five to six days. A reduction in the standard interval is not necessary to achieve compliance with Checklist Item 4.

Line and Station Transfers for Line Sharing.

151. Line sharing must also be available to CLECs that seek to serve customers whose lines are partially fiber and are served by digital loop carrier (DLC) facilities. Loops equipped with DLC are fiber between the central office and the remote terminal, and copper from the remote terminal to the customer's premises. To provide xDSL service, which is a copper-based technology, the CLEC must obtain access to the copper portion of the loop. CLECs seeking to serve customers with DLC on their lines have three provisioning options available to them, all of which require that the CLEC collocate a POTS splitter at the central office serving the end user. First, the CLEC may collocate at the remote terminal (RT) and interconnect at the feeder distribution interface (FDI), then transport its data signal back to the central office using unbundled dark fiber (if available). Second, the CLEC could do essentially the same thing except, instead of using dark fiber, the CLEC could purchase a DS-1 or DS-3 transmission path to send its data signal back to the central office. Third, Qwest could switch the customer's line to a full copper loop, if facilities are available, through a line and station transfer (LST).[209]

152. As of August 2, 2002, Qwest implemented an LST process for CLEC line sharing orders that requires CLECs to submit a separate order for any LST that is necessary, and Qwest proposes to charge CLECs between $80 and $200 for LSTs (approximately 40 times the nonrecurring charges a CLEC would otherwise incur for ordering a line-shared loop). Qwest also proposes to expand the provisioning interval to 15 days for line sharing orders when it performs an LST. Covad challenges the proposed process, the cost, and the provisioning interval. Covad contends that the search for spare copper should be a standard part of the provisioning process for all loop orders where facilities are not immediately available, just as it is when an order is placed for an unbundled loop; [210] it contends the cost should be zero, because LSTs

are comparable to conditioning, and Qwest is not allowed to charge for conditioning; and it further contends that the process should be concluded in the standard interval for line shared loops.

153. Qwest does not dispute that it will perform an LST without charge to provide an unbundled loop (one that is free of DLC) as part of its standard provisioning process, because it is far more efficient to switch a customer to an all-copper line, if available, than to remove a DLC system from its feeder network.[211] Qwest will confirm to a CLEC within 72 hours (three business days) whether loop facilities are available,[212] with the installation interval dependent on the type of installation requested.

154. With regard to Covad's first issue, there is no reason why the search for spare copper for a line-sharing order should not be a standard part of the provisioning process, as it is for loops. The special request process appears to be unnecessary. With regard to the cost, that issue is dependent on whether line sharing over fiber is or is not an unbundled network element; if it is a UNE (which decision is to be made in the pending docket), these NRCs would have to be priced at TELRIC, and the reasonableness of including a charge for an LST would be determined by the parameters of the cost model ultimately selected. Finally, with regard to the provisioning interval, it should be comparable to whatever time is required to perform an LST on an unbundled loop.

155. Covad further maintains that Qwest performs LSTs for its own retail DSL customers within the five business-day interval to provide retail DSL service, and that Qwest's refusal to commit to the same standard for Covad is discriminatory. Covad has failed to prove by a preponderance of the evidence that Qwest performs LSTs for its retail DSL customers.

Access to POTS Splitters.

156. In order to gain access to the high frequency portion of the loop, line splitting is required. A line splitter is the electronic equipment that splits the low and high frequency portions of the loop. The ICAs proffered by Qwest do not allow CLECs access to the outboard splitters placed in central offices and remote terminals. AT&T maintains that Qwest is obligated to provide CLECs with access to its central office line splitters on a line-at-a-time or shelf-at-a-time basis, because splitters are a "feature, function, or capability of the loop" that must be provided to the CLEC.

157. The FCC has rejected this argument in the context of a § 271 proceeding:

> The Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. . .. We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching elements.[213]

AT&T is correct that the Commission could exercise its authority, under either § 253 of the Act or its independent state authority, to require something different.[214] AT&T could seek arbitration of this issue and fully develop the record in Minnesota on whether Qwest's splitters are "connectorized" or hard-wired to Qwest's DSLAMs or otherwise technically inaccessible and whether access to Qwest-owned splitters would serve to advance competition. The issue here, however, is whether Qwest's current offerings are sufficient for purposes of § 271, and the FCC has clearly determined that the answer to that question is yes.[215]

Collocation of CLEC Splitters on the MDF.

158. Pursuant to § 9.4.2.3.1 of Qwest's SGAT, Qwest will permit a CLEC to install POTS splitters on Qwest's main distribution frame (MDF) only if an ICDF is not available or when the central office has less than 10,000 lines. The stipulated line sharing agreement in Minnesota, to which Covad is a party, provides that Qwest will install the splitter in one of three locations in the central office: (a) in a relay rack as close to the ICDF or the CLEC DS0 termination points as possible; (b) on the ICDF; or (c), where options (a) and (b) are not available, on the main distribution frame or in some other appropriate location.[216] It further provides that "[t]he issue of splitter placement in the central office may be revisited after initial implementation to explore additional options and configurations."[217]

159. Covad maintains that it should be able to place splitters on Qwest MDFs because this is the most efficient and least expensive way to install them, requiring fewer and shorter cross-connect cables than other placements. Qwest contends that Covad and other CLECs participated in negotiating the placement options, Qwest made the financial investment by adding ICDFs and common area equipment bays in central offices with more than 10,000 lines, and therefore CLECs should be required to use that equipment if available so Qwest's investment is not stranded.[218] Qwest's adherence to the terms of the negotiated agreement is not unreasonable, and there is insufficient evidence that Qwest has "relaxed" this policy for CLECs in other states, as alleged by Covad. Qwest need not change this SGAT term to comply with Checklist Item 4.

SOC for Line Shared Loops.

160. At the end of the provisioning process for line-shared loops, Qwest provides a service order confirmation (SOC) or completion notice to the ordering CLEC. Qwest has admitted that SOCs are triggered not by work events (such as actual completion of a work order), but are instead issued automatically on the date contained in the firm order commitment (FOC) regardless of whether Qwest has completed the actual central office provisioning work. Qwest has referred to this step of the process as an "administrative close." To correct these operational issues, Qwest has agreed to perform a router test on line shared loops.

161. Covad maintains that while the operational issues have been resolved, the performance issues have not been. It contends that the PIDs for line shared loop installation performance, which are measured from receipt of a complete and accurate

LSR to the issuance of an SOC, do not reflect Qwest's actual performance and that instead the properly measured interval is from the receipt of the LSR to the completion of the router test. This issue is addressed in the section on performance issues.

Access to Loop Qualification Information.

162. Characteristics of a loop, such as its length and the presence of various impediments to digital transmission, can hinder the provision of advanced services technologies. Providers of advanced services need to prequalify loops by accessing basic loop make-up information to assist the carrier in determining whether the loop can support a particular advanced service. Incumbent LECs must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install.

163. At a minimum, the incumbent LEC must provide requesting carriers the same underlying information that the LEC has in any of its databases or other internal records.[219] This includes access to the underlying loop qualification information contained in its engineering records, plant records, and other back office systems.[220] If an incumbent LEC has not compiled such information for itself but has manual access to this sort of information, it must provide access to a requesting carrier on a nondiscriminatory basis.[221] To the extent that LEC employees can access the information in an electronic format, the same format should be made available to competitors via an electronic interface; to the extent that such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any retail personnel are able to obtain such information.[222]

164. Qwest provides loop makeup information to its retail DSL personnel through the Loop Qualification Database (LQDB); the same information is available to competitors through the Raw Loop Data Tool (RLDT).[223] The source for both of these databases is the Loop Facilities and Assignment Control System (LFACS), which Qwest considers to be a proprietary legacy system.

165. The RLDT provides the following information about the composition of each segment of the loop: (i) telephone number, (ii) address, (iii) common language location identification (CLLI), (iv) MLT distance (on copper loops only), (v) terminal ID, (vi) cable name, (vii) pair gain type and presence by segment, (viii) pair number, (ix) load type, (x0 number of load coils per segment of the loop, (xi) bridged tap offset by segment, and (xii) cable gauge and length by segment, including length of bridged tap.[224] The RLDT also provides information on fully-connected spare facilities and partially-connected spare loop segments, as well as information on nonpublished and nonlisted telephone numbers and loop make-up for numbers associated with Centrex and PBX systems.[225] In March 2002 Qwest added loop make-up information on working unbundled loops assigned to CLECs.[226]

166. Qwest's Loop Qualification Tool provides loop makeup information for Qwest DSL for resale and ADSL. The Qwest DSL portion of the tool is based on the same tool used by Qwest retail to qualify its loops for DSL customers. The unbundled loop qualification portion of the tool is used to determine if a loop meets the technical requirements for ADSL-compatible loops. Both portions of the tool return loop data containing 12 different data points, including loop length. The source for the information in the tool is the LFACs database.[227]

167. Qwest does not maintain that the loop information provided through these tools or the LFACS database itself is always accurate. Some loop information resides in other databases and records, such as TIRKS or Work Force Administration (WFA). In June 2002 Qwest implemented a manual process to allow CLECs to obtain any loop makeup information contained in back office records, systems, and databases. Qwest has agreed to return the information to the CLEC via email within 48 hours, and to update the RLDT or Loop Qualification Tool with the information found in the manual search.[228] Qwest has agreed to add the manual process language to its Minnesota SGAT.[229] Qwest has also agreed to incorporate language permitting CLECs to request an audit of company records, back office systems, and databases pertaining to loop information, as required by the state commissions in Washington and New Mexico.[230] Although Qwest has offered the manual process for several months, no CLEC in Minnesota has yet made a request to use it.[231]

168. An incumbent LEC is not allowed to "filter or digest" the loop qualification information, but must provide information on any basis that it provides such information for itself.[232] AT&T contends that the process by which Qwest extracts loop information from LFACS for use in the RLDT improperly "filters" the information and that CLECs must have access, whether direct or mediated, to the LFACS database on the same terms that any Qwest employee would.

169. Although AT&T certainly has established that some (non-retail) Qwest employees, such as engineers and information technology staff, have access that CLECs do not have to LFACS and other databases containing loop information, AT&T has not established that in creating the RLDT Qwest has "filtered out" any necessary loop qualification information or has otherwise denied access to it. Qwest provides electronic access to the RLDT because Qwest retail uses a similar electronic database to qualify loops; it provides access to any other loop information in its back office records, systems, or databases through the manual search process that no Minnesota CLEC has yet requested. There is no question but that Qwest is obligated to provide access to all back office information pertaining to loop qualification that is accessible to any Qwest personnel, but it must do so within the time intervals that Qwest provides or could provide the information to its own retail personnel. Simply because a Qwest engineer has direct or mediated access to LFACs or other databases does not mean that CLECs are entitled to direct or mediated electronic access to these other databases. There is no compelling evidence in the record that Qwest is allowing its retail personnel access to loop qualification information that it denies to CLECs, or that retail personnel get this information any faster than the 48-hour period that would be applicable to CLECs.

170. AT&T also contends that the RLDT fails to provide information on spare facilities that are not connected to a Qwest switch or other facilities that are not yet connected to the Feeder Distribution Interface or other distribution terminals. Qwest maintains that this information is contained in the RLDT and can be obtained using assigned or unassigned address queries.[233] AT&T's argument is conclusory and factually unsupported.

171. Covad contends that the RLDT fails to provide accurate and reliable loop makeup information. Covad contends that Exhibit 184, a collection of Covad orders held during a sample six-week time period, shows that 44% of Covad's line shared loops were held for conditioning to remove load coils and bridged tap, even though the RLDT indicated that no conditioning was required when the loops were prequalified. The exhibit does not support Covad's conclusion; the RLDT screen prints were run after the orders were filled and presumably after any necessary conditioning was performed. Furthermore, Covad has no credible factual basis for contending that screen prints reflecting the presence of bridged tap on orders that have been filled demonstrate that Qwest's RLDT is not properly updated. Qwest presented credible evidence that it removes excessive bridged tap, but may leave in place minimal amounts that do not disqualify the loop for DSL.

172. In approving Qwest's application in nine other states, the FCC rejected all arguments that Qwest failed to provide loop qualification information in a nondiscriminatory manner. Specifically, the FCC relied on the KPMG audit results finding no differences in access to information between Qwest retail and competitors. The FCC further concluded that to the extent that the information in the RLDT or Loop Qualification Tool is incomplete or inaccurate, there is no difference in the information available to Qwest retail and competitors, thus there is no discrimination. In addition, the FCC found that the manual search process is an adequate method of ensuring that inaccurate or incomplete information in the RLDT or Loop Qualification tool is supplemented with any additional information available to any Qwest personnel.[234]

173. Covad contends Qwest should be subject to an audit of all back office information concerning loop qualification before receiving 271 approval. This argument is without support in the record. The KPMG audit was conducted with full participation of CLECs in development of the test criteria, and CLECs had an opportunity to comment on all of KPMG's findings. KPMG determined that there was parity in the design, implementation, and use of Qwest's loop qualification process and in the remedial options available to CLECs and Qwest customers. KPMG found consistent processes for initiating, qualifying and escalating requests for Qwest DSL, ADSL, and wholesale DSL services.[235] Since the KPMG audit, Qwest has agreed to amend its SGAT to add the audit language referenced above concerning back office records and databases. If a CLEC wishes to invoke the audit rights contained therein, it may do so at any time. The record simply does not justify requiring a pre-approval audit before finding compliance with Checklist Item 4.

Mechanized Loop Testing (MLT).

174. Because they assert the loop qualification information provided by Qwest is inaccurate or unreliable, AT&T and Covad contend that Qwest must make pre-order MLTs available to CLECs for purposes of pre-order loop qualification. When Qwest created the Loop Qualification Database (LQDB) more than two years ago, it used MLTs to estimate loop length where that information was not available. The results of those MLTs were loaded into the LQDB. Qwest also uses MLTs to update estimated loop length information in the LQDB as part of the monthly refresh process.[236] Qwest uses MLTs during the provisioning process for unbundled loops before turning them over to CLECs; in addition, Qwest uses MLTs during the repair process, at which time it makes MLTs available to CLECs.[237]

175. Qwest does not use MLTs on a pre-order basis to qualify loops for Qwest DSL; Qwest retail sales representatives do not have access to MLTs or the information resulting from them.[238] The FCC has never required pre-order access to MLTs as a condition of receiving § 271 approval.

176. To perform an MLT, a loop must be connected to a Qwest switch and have a telephone number. An MLT cannot be performed on spare facilities or on unbundled loops provided to another CLEC. Covad consequently seeks pre-order MLTs only for line shared loops.[239] Qwest performs no testing on line shared loops prior to delivery to the CLEC, based on the expectation that its voice customer would have sought repair services if there were a problem with the quality of the line.[240]

177. There is no basis for requiring Qwest to provide pre-order MLTs to CLECs when it does not use them itself on a pre-order basis; Qwest need not provide pre-order MLTs in order to achieve compliance with Checklist Item 4. The FCC declined to find that Qwest's failure to provide pre-order MLT warrants a finding of checklist noncompliance.[241]

178. AT&T and Covad also contend that Qwest should provide pre-delivery access to MLTs for line shared loops and access to MLT results for unbundled loops. Qwest maintains that MLTs are neither useful nor necessary in the pre-ordering or provisioning of line shared loops. Qwest maintains it performs MLTs only in the course of provisioning converted unbundled analog loops to CLECs to ensure that it provides working loops, and never in the course of determining whether loops are qualified for Qwest DSL retail. Qwest also maintains that MLTs are not nearly as useful in providing loop qualification information as are the RLDT and the Loop Qualification Tool.

179. Qwest has demonstrated that, when used properly, the RLDT and the Loop Qualification Tool provide information that is more tailored to the loop qualification process than are MLTs, which are primarily a diagnostic as opposed to a qualification tool.[242] Qwest does not use MLTs to provision retail DSL or to provide unbundled loops to itself. Qwest may be discriminating in the sense that it uses MLTs to provide unbundled loops to CLECs but does not use them to provide line shared loops, but

there is no credible evidence to suggest that Qwest is discriminating in violation of the Act by doing something for itself that it refuses to do for CLECs.

180. The same is not true, however, when it comes to Qwest's use of the data generated by MLTs in the provisioning process. Qwest loads those results into the WFA database, but does not use them to update information in the RLDT or the Loop Qualification Database. The record in this proceeding demonstrates that MLTs generate some information that could be used to pre-qualify a loop, especially in situations where the RLDT data are incomplete or inaccurate, such as additional data about loop length and suitability for DSL services.[243] The Administrative Law Judge agrees with the FCC that it is not necessary to require additional testing in order to demonstrate checklist compliance, given that Qwest generally has demonstrated the adequacy of the RLDT and the Loop Qualification Tool; once Qwest does the testing and creates the information at the provisioning stage, however, it should be obligated to share those results if CLECs ask for them. It is clear that at least some of the information generated by an MLT could be used for loop qualification purposes; the information is available to Qwest back office personnel and consequently it should be made available to CLECs through the manual review process, as would all other back office information about loop qualification (such as that available in the CIMAGE or OSP-FM databases), if Qwest is to comply with the *UNE Remand Order.* To the extent that the FCC believes it is "inconsequential" [244] that Qwest does not share this information with CLECs, the Administrative Law Judge respectfully disagrees. These results provide information that could be used to pre-qualify a loop, and this information should be available to CLECs through the manual review process if Qwest is to comply with Checklist Item 4.

181. Finally, AT&T and Covad contend that Qwest's application for § 271 authority should be denied because Qwest attempted to conceal its use of MLT testing from FCC staff who visited the Omaha wholesale provisioning facility. The information ultimately disclosed about this incident, however, proves nothing about discrimination in the performance of MLTs at the pre-ordering or provisioning stages. Qwest's lack of candor alone should not preclude § 271 approval provided it makes the changes specified herein to achieve compliance with checklist item 4.

Subloop Unbundling.

182. The FCC requires that Qwest provide unbundled access to the network interface device (NID), and Qwest must provide access to the NID unless it is technically infeasible to do so.[245] Qwest allows requesting CLECs to connect their own loop facilities to on-premises wiring through Qwest's NID or at any other technically feasible point. Section 9.5 of the FTTH Agreement contains Qwest's commitment to provide CLECs with access to unbundled NIDs. To date, no Minnesota CLEC has requested access to a stand-alone NID.[246]

183. Most of the disputed issues concerning access to subloops or NIDs were essentially resolved during the hearing when Qwest clarified that in Minnesota, Qwest operates under Minimum Point of Presence (MPOP) rules and does not own

intrabuilding cable except in airports, trailer parks, and marinas.[247] In most situations CLECs consequently are able to access NIDs without contacting Qwest to determine who owns the wire on the customer side. Qwest should clarify its SGAT to state that § 9.3 is not applicable in Minnesota except in airports, trailer parks, and marinas.

184. AT&T contends that, even with this clarification, Qwest should not be permitted to interpose "significant access barriers" in airports, trailer parks, and marinas by requiring the use of an LSR (§ 9.3.3) and nonrecurring inventory fee (§ 9.3.6.4.1). Use of the LSR in these limited situations does not impose an unreasonable barrier to CLECs desiring access to the NID. The MPUC would determine the reasonableness of any inventory fee in a manner consistent with its decisions in the related pricing docket.

185. AT&T maintains[248] that Qwest's ICA with FTTH fails to make all types of subloop elements available to CLECs. The FTTH agreement specifies four subloop types as the standard subloop offerings; other subloops are available through its special request process.[249] CLECs have in service only 69 subloops in Qwest's 14-state region, all of them requested from the standard subloop categories.[250] Given the relatively low level of demand for other types of subloops, reliance on the special request process in appropriate circumstances is sufficient.

186. AT&T also contends that Qwest inappropriately limits access to the NID to cases where space is available without rearranging dormant Qwest wires. AT&T contends that it is technically feasible to remove Qwest's connection to make room on the NID using a procedure called "capping off." Qwest does not dispute that it is technically feasible to proceed in this manner, but contends that it may be unsafe to do so depending on the qualifications of the person doing the work. In § 271 proceedings in the state of Washington, Qwest was required to modify its SGAT to allow qualified CLEC technicians to remove non-working Qwest facilities from the NID to provide space for CLEC facility terminations, as long as industry practices are followed to avert any danger of excessive voltage to unqualified personnel.[251] Qwest's facilities would be left at the premises in the event that the service reverts back to Qwest.

187. The record demonstrates that it is not technically infeasible to allow access to the NID in the manner described in the preceding Finding. Qwest should be required to amend its Minnesota SGAT to permit CLECs to remove Qwest's connection and to include the language from § 9.5.2 of its Washington SGAT.

IX. CHECKLIST ITEM 5 – LOCAL TRANSPORT.

188. Checklist item 5 requires Qwest to provide "[l]ocal transport from the trunk side of the a wireline local exchange carrier switch unbundled from switching or other services."[252] The FCC has defined checklist item 5 to include both dedicated transport (where an individual carrier has a transport facility "dedicated" for its use) and shared transport (where multiple carriers "share" the transport infrastructure utilized by Qwest to transmit calls).[253] Qwest provides both dedicated transport and shared transport to CLECs in Minnesota. No issue has been raised regarding Qwest's provision of shared transport to CLECs conforming with FCC requirements.[254] The issues that have been

raised regarding checklist item 5 concern dedicated transport. Most of those issues have been resolved by the parties.

Separate Regeneration Charge for Dedicated Transport at Its Collocation.

189. AT&T asserted that Qwest should be required to provide high capacity transport (and other UNEs) with the appropriate templated signal (i.e., a signal that meets appropriate industry standards) at the CLEC's collocation cage.[255] As discussed in foregoing Findings, Qwest maintains that its approach is to collocate equipment in locations where regeneration is not needed.[256] The resolution of this issue in the discussion on collocation appears to resolve this issue in the transport context as well.

X. CHECKLIST ITEM 6 – LOCAL SWITCHING UNBUNDLED FROM TRANSPORT.

190. Checklist item 6 requires an RBOC seeking Section 271 approval to demonstrate that it provides "[l]ocal switching unbundled from transport, local loop transmission, or other services."[257] Qwest asserts that the requirements of Checklist Item 6 are met since Qwest provides circuit switching to CLECs in Minnesota, principally in UNE combinations as part of a UNE-P line. The FTTH and Arizona Dial Tone interconnection agreements as well as Qwest's Minnesota SGAT make circuit switching and customized routing available to CLECs.[258]

191. Worldcom and AT&T maintain that the limitations on an ILEC's obligation to provide unbundled switching that the FCC adopted in the *UNE Remand Order*, even when properly implemented, could result in the *entirety* of Zone 1 and a significant proportion of Zone 2 being closed to CLECs seeking to serve business customers using UNE-P. Such an action could have an adverse impact on consumers by reducing the availability of competition in significant areas of Minnesota. AT&T recommends that the Commission conduct its own unbundling analysis to ensure that customers in areas outside of the federally mandated exchanges are afforded the opportunity to obtain service from competitors through unbundled local switching.

192. In the *UNE Remand Orde*r, the FCC determined that unbundled local switching is a UNE that ILECs must make available to CLECs because, in general, requesting carriers are impaired without access to unbundled switching.[259] However, the FCC concluded that the record appropriately supported the establishment of an exception to unbundled switching; specifically:

> [R]equesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (MSAs), as set forth in Appendix B, where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1.[260]

193. The expansion of unbundled switching, independent of FCC requirements, is beyond the scope of the issues properly before the FCC in a Section 271 application.

Such an issue can only be resolved in an independent proceeding where an appropriate record can be developed.

Access to Advanced Intelligent Network Software Services.

194. Advanced Intelligent Network (AIN) is deployed software that allows deployment of switched features (such as call screening) remotely from the particular switch that is processing a particular telephone call. AIN is applied by programming the switch to suspend the processing of a call until the controlling software is queried as to how to proceed with that processing. The advantages of AIN are twofold: the features offered to customers are no longer limited to the capabilities of each individual switch, and carriers are free to deploy software offering different capabilities from competitors, thereby establishing competitive differences between carriers.

195. The FCC has required unbundling of certain AIN capabilities and exempted others from the unbundling obligations. The FCC stated in its UNE Remand Order:

> Because certain services created in the AIN platform and architecture are proprietary, we agree with Ameritech and BellSouth that if competitive LECs receive unbundled access to incumbent LECs' AIN platforms, access to AIN service software should not be unbundled.[261]

196. AT&T and WorldCom acknowledge that Qwest complies with the FCC's decision on unbundling some AIN software features and the AIN platform.[262] But these parties assert that the "FCC disregarded its own standards for determining whether a network element is proprietary or necessary."[263] They maintain that the remaining portions of AIN should be unbundled unless Qwest affirmatively demonstrates that the particular AIN capability qualifies for the proprietary service software exception.

197. As discussed in other findings, the FCC's approach in 271 proceedings is to leave interpretive disputes for particular enforcement proceedings. The approach taken by Qwest regarding AIN is consistent with the FCC's standard on the subject in its *UNE Remand Order*. Qwest has demonstrated compliance with checklist item 6.

XI. CHECKLIST ITEM 11 – LOCAL NUMBER PORTABILITY.

198. Checklist item 11 requires that the BOC demonstrate compliance with the applicable rules for local number portability (LNP).[264] LNP is the ability of users of telecommunications services "to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[265] AT&T raised concerns over the use of the managed cut process to coordinate LNP with CLEC-provided loops.[266] The managed cut process is used primarily with businesses and AT&T considers the process unwieldy in mass market application. Qwest suggested that allowing CLECs to delay the porting time by providing notice by noon on the day following the scheduled due date would address the CLECs' concerns. Qwest agreed

to revise its SGAT to include language that properly reflects its new process.[267] With these SGAT revisions, AT&T agrees that the issue of whether Qwest has a concrete and specific legal obligation to provide LNP is resolved.

199. AT&T raised other issues regarding LNP, but all of them relate to the Qwest's measures of performance on providing LNP. Those issues will be discussed in subsequent Finding in the portion of the Report dealing with performance. Qwest has demonstrated its concrete and specific legal obligations to provide LNP pursuant to Section 10.2 of the Arizona Dial Tone Agreement, the FTTH Agreement and the Minnesota SGAT. Qwest has demonstrated compliance with checklist item 11.

XII. CHECKLIST ITEM 13 – RECIPROCAL COMPENSATION.

200. Checklist item 13 of the Act requires that an RBOC's access and interconnection include "[r]eciprocal compensation arrangements in accordance with the requirements of § 252(d)(2)."[268] That statutory provision states that "a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[269]

201. AT&T maintains that checklist item 13 cannot be met by Qwest if compensation rates are not structured in accordance with FCC rules and those rates are not symmetrical. Specific provisions that AT&T maintains are violative of these requirements are Qwest's assignment of the point of interconnection, its definition and description of entrance and direct trunk transport facilities, and its imposition of a 50-mile limit on DTT.[270] Each of these issues has been addressed in foregoing Findings. No violations of FCC rules have been found. None of these items constitutes a showing that Qwest has failed to demonstrate compliance with checklist item 13.

202. AT&T asserted that failure to permit rate ratcheting constituted a violation of the reciprocal compensation requirement. That issue was analyzed earlier in this Report (and decided against AT&T). Inter-carrier payments for internet service provider (ISP) traffic and classification methods for some CLEC switches are issues that AT&T identified as settled, assuming that the associated SGAT provisions are approved by the Commission. Qwest has demonstrated that it is in compliance with checklist item 13.

XIII. CHECKLIST ITEM 14 – RESALE.

203. Checklist Item 14, 47 U.S.C. § 271(c)(2)(B)(xiv), requires Qwest to make telecommunications services available for resale by CLECs in accordance with the requirements of sections 251(c)(4) and 252(d)(3). There are no issues regarding the

availability of services for resale. But the terms under which those services are offered are asserted to be discriminatory in a variety of ways.

Discrimination through Termination Liability Assessments.

204. Commerce maintains that Qwest has failed to demonstrate nondiscrimination in the provision of resale through Qwest practices regarding termination liability assessments ("TLAs"). TLAs are billing charges levied against customers who terminate long-term contracts for service. The imposition of such a charge can deter a customer from choosing a competitor prior to the end of the contract, since the TLA imposes an additional cost should the customer choose a different telecommunications provider.

205. The Commission has addressed the issues surrounding Qwest's imposition of TLAs upon former Qwest retail customers who terminated their contracts with Qwest in favor of taking service from a CLEC providing resold Qwest services. The Commission has rejected the use of TLAs every time the issue has arisen over the past six years, with one exception.[271] Recently, the Commission again found that the TLAs proposed by Qwest for inclusion in its Minnesota tariff were not fair and reasonable, but were anti-competitive and unreasonably restricted resale.[272] In its *TLA Order*, the Commission held that for TLAs to be approved, Qwest must prove that the proposed TLAs are:

a. fair and reasonable under Minn. Stat. §§ 237.06, 237.011 (2), and 237.082;
b. not unduly discriminatory under Minn. Stat. § 237.60; and
c. do not impair competition or unreasonably restrict resale under Minn. Stat. § 237.121(a)(5) and 47 U.S.C. §§ 251(b)(1) and 251(c)(4).

206. The Commission held that in order to demonstrate these things, Qwest must show that the proposed TLAs reflect the actual retail costs that the Company does not avoid when it converts long-term retail contracts to long-term wholesale contracts -- Qwest must show that the non-price terms of the contracts are fair, reasonable and non-discriminatory and not likely to impair competition.[273] After reviewing the evidence, the Commission found that Qwest's cost analysis was "insufficiently accurate, detailed and rigorous to support its TLA proposals," and thus could not conclude that the TLAs constitute just and reasonable rates.[274] The Commission further rejected Qwest's proposed TLAs, finding them "as unreasonably restricting resale under Minn. Stat. § 237.121(a)(5) and 47 U.S.C. § 251(b)(1) and (c)(4)."[275]

207. Qwest asserts that it complies with the Commission's rulings regarding the application of TLAs. Specifically, Qwest maintains that it does not apply TLAs when a Qwest retail end user converts its local service to resale service provided by a reseller CLEC. The policy was described as follows:

… Qwest established a policy effective September 29th, 1998 requiring that Qwest would not apply TLA if the Qwest retail end user or a reseller CLEC, including Infotel, advised Qwest that the retail end user was terminating a contract or other arrangement in which TLA would otherwise apply and that the end user was obtaining the same or comparable services from the reseller CLEC for the period remaining in the original contract or other arrangement and the reseller ordered resold services or the end user equal to or comparable to the contract and service or other arrangement.[276]

208. The policy described by Qwest did not preclude the billing of TLAs. Qwest only indicated that it would not apply TLAs in certain contract terminations. To avoid the application of TLAs under the policy described, the CLEC or customer must affirmatively inform Qwest that the TLA does not apply and in some fashion prove that equivalent resold services have actually been obtained by the customer. On October 2, 2001, Qwest asserted that it would cease "billing and collection of unpaid TLAs for any Minnesota retail contracts entered into after September 29, 1998 where Qwest knows that the customer under contract has switched to resold service from a reseller of Qwest's services."[277]

209. Even under the October 2, 2001 policy, Qwest has not described how it will distinguish between customers where TLAs can be appropriately billed and customers who are exempt from that charge. The assessment of a TLA is a manual process.[278] The Department of Commerce has shown that Qwest has recently billed TLAs in error.[279] Anticompetitive effects arising from TLAs are materially aided by customers' lack of awareness that the charge may be improper. Qwest can increase customer awareness by adding a statement to the bill charging the TLA that the TLA is only applicable where the customer has not obtained substantially similar services from a reseller. No such information is provided to consumers in Qwest's current bills.[280]

Credits to Resellers for Poor Service.

210. AT&T asserts that Qwest's SGAT fails to make CLECs whole when service credits are made to customers due to Qwest's failure to perform.[281] Qwest responded that the suggested indemnification could result in open-ended liability.[282] Qwest relies upon SGAT § 6.2.3.2 to demonstrate that appropriate service credits are payable to CLECs in the event of service problems.[283] That SGAT section limits the payment to the discounted price paid by the CLEC.

211. There is certainly merit to the contention that poor service by Qwest to a CLEC can damage the CLEC's business reputation. Such poor service can also damage the CLEC's bottom line, by compelling the crediting of the customer for service not received. The SGAT recognizes that Qwest should be making refunds to the CLEC up to the full amount of the CLEC's payment to Qwest. But AT&T has not demonstrated that requiring Qwest to pay the CLEC's portion of the credit to the customer is an appropriate business practice under the Act.

Discrimination in Resale through Unfiled Agreements.

212. AT&T and the Department contend that the unfiled agreements show price and service discrimination between CLECs. Qwest's failure to identify the discounts provided to Eschelon and McLeod, and offer VMS on the same terms to all CLECs have been discussed previously in this Report. That discrimination has already been recognized by the Commission in setting a penalty phase for the Unfiled Agreements docket.[284] In accordance with the FCC approach, bifurcating enforcement actions from the Section 271 approval process, the demonstrated discrimination should be remedied in that proceeding.

XIV. PERFORMANCE ISSUES.

213. The FCC looks to the actual experience of CLECs interconnecting with an RBOC in determining that "it is currently furnishing or is ready to furnish the checklistitem in the quantities that competitors may reasonably demand and at an acceptablelevel of quality."[285] The FCC has shown a preference for performance measures negotiated through an open process. When "[performance] standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time or manner or in a way that provides them a meaningful opportunity to compete."[286] The FCC's standards for Section 271 compliance are parity and, where a negotiated benchmark exists, satisfaction of the benchmark. As the FCC has stated:

> Thus, to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, [i.e., parity] the Commission generally need not look any further. Likewise, if a BOC's provision of service to competing carriers satisfies the performance benchmark, the analysis is usually done.[287]

ROC Standards Development.

214. Qwest, Covad, AT&T, Worldcom and the Minnesota Department of Commerce (the "DOC") actively participated in the Regional Oversight Committee's test of the access that Qwest provides to its OSS (the "ROC OSS Test"). The ROC OSS Test process lasted for more than two years and was supervised by thirteen state commissions, including the Minnesota Public Utilities Commission. The ROC established performance indication definitions (PIDs), established benchmarks, and parity levels through a process that negotiated the eventual standards applied to determine results of the testing. The testing was conducted by KPMG Consulting (KPMG), which issued its *Final Report Regarding Qwest Communications OSS Evaluation* (the "KPMG *Final Report*")on May 28, 2002. The KPMG *Final Report* identified pre-ordering, ordering, provisioning, maintenance and repair, billing, and relationship management as areas of OSS functioning assessed through the testing.[288]

215. KPMG functioned as the test administrator. Hewlett-Packard Consulting (HP) acted as the pseudo-CLEC, providing a controlled subset of data that was intended to be reflective of the general experience of CLECs when interconnecting with Qwest's OSS. Liberty Consulting conducted a performance measurement audit (PMA) of the data collection, processing, and reporting procedures used in the testing.

216. To make a *prima facie* showing of compliance with the Section 271 checklist requirements, Qwest must show by a preponderance of the evidence that: (1) the PID measures accurately and completely capture the checklist requirements, (2) the underlying data are reliable and have been properly reconciled with the experience of Minnesota competitors, and (3) with a reasonable degree of certainty, Qwest passes the PID measures on a sustained basisand therefore provides competitors with service at least at parity with the service that it provides for its own retail operations.[289]

Competing Statistical Measures of Performance.

217. The first issue to resolve is how to measure performance. The ROC employed a single hypothesis ("one-tail") test at a 95% confidence level to remove random fluctuations from performance data.[290] A 95% confidence level means that 5% of the time that Qwest appears to have failed a measure due to discrimination against CLECs, it actually did not discriminate.[291] Conversely, when Qwest appears to have failed that measure due to discrimination, 95% of the time Qwest actually did discriminate.[292] The underlying assumption to the one-tail test (known as the "null hypothesis") is that there is no discrimination against competitors*.*[293]

218. The Department of Commerce and AT&T objected to the use of a one-tail test as making the wrong assumption in measuring Qwest's performance. This is due to the possibility that two kinds of decision-making errors are possible in the performance analysis necessary for this proceeding. First, the Commission could determine that Qwest fails to meet performance standards when it, in fact, does meet the standards. This mistake constitutes a "false fail" (a "Type I" error, given Qwest's formulation of the statistical test). Second, the Commission could judge that Qwest passes a performance measure when it, in fact, does not meet the standards. This would be a "false pass" (a "Type II" error).[294] Qwest's one-tailed test minimizes Type I errors, while increasing Type II errors; that is, Qwest's test increases the risk of falsely concluding that Qwest has "passed" a PID when in fact Qwest provides competitors with inferior service.[295]

219. An example drawn from reconciled data sets out how the one-tailed test establishes a bias in favor of Qwest passing each standard measured with that test.[296] A sample of 113 line sharing orders placed with Qwest by Covad for customers in Utah and Minnesota were examined for compliance with OP-4. OP-4 calculates the average time to install services ordered by CLECs. [297] Liberty Consulting Group ("Liberty") described the results of this reconciliation as follows:

> Liberty reconciled a sample of 113 line-sharing orders for performance measure OP-4. For 19 orders, Qwest and Covad agreed. For 65 orders, Qwest was correct, not shown to be wrong, or the data were inconclusive. Qwest was wrong

on 29 orders. Fourteen of these involved the retail/wholesale issue discussed in Observation 1026, 13 involved the CLEC being unknown discussed in Observation 1029, 1 order Qwest mistakenly cancelled, and 1 order Qwest's records had an incorrect due date that caused the order to be excluded.[298]

220. Qwest relies upon the characterization of results as "Qwest was correct, not shown to be wrong, or the data were inconclusive," to categorize these results as showing compliance with the OP-4 standard.

221. The Department's statistical approach (discussed below) does not assume that data not shown to be wrong is, in fact, correct. Similarly, the Department's approach does not assume that inconclusive data should be counted as a demonstration that Qwest meets the standard. Applying the Department's approach to the Liberty reconciliation results in the following distribution:[299]

Category	# in Category	% in Category
Total Records	113	100%
CLEC and Qwest data reconciled	19	16.8%
Qwest shown to be correct	36	31.9%
Qwest not shown to be wrong	12	10.6%
Data inclusive	17	15.0%
Qwest shown to be wrong	29	25.6%

222. If the assumption of Qwest's compliance is abandoned, these results show that Qwest has demonstrated that 48.7% of Covad's orders from this sample were handled correctly. This level of performance does not demonstrate parity of performance under the OP-4 PID. Liberty was only able to verify that Qwest's data were correct for fewer than half of the orders examined.[300] Similar results were obtained in Liberty's analysis for 119 line-sharing orders relative to performance measure PO-5. More than one-third of the time, Liberty was not able to verify that Qwest's data were correct.[301]

223. The Department of Commerce and AT&T proposed an alternative approach to statistical testing of Qwest's PID results: a form of "dual hypothesis" testing that is based on "Bayesian" principles.[302] The Department maintains that the dual hypothesis testing remedies the flaw in Qwest's statistical test by balancing Type 1 and

Type 2 errors.[303] This approach would significantly reduce the potential for a "false pass" on a standard. This approach also more closely approximates the actual levels of service experienced by CLECs.

224. Qwest objects to the use of the dual hypothesis test (also described as "Bayesian" or "two-tail" testing). Qwest asserts that the FCC relies upon negotiated standards at the regional and state levels to determine relevant data, compliance levels, and statistical methods of measurement.[304] Section 271 proceedings have uniformly employed the one-tail test at a 95% confidence level[305] A 95% confidence level means that 5% of the time that Qwest appears to have failed a measure due to discrimination against CLECs, it actually did not discriminate.[306] The FCC held: "We use the 95 percent confidence level because it is a commonly used standard, and because it gives us a reasonable likelihood of detecting variations in performance not due to random chance, with few false conclusions that variations are not due to random chance."[307] Qwest maintains that using a null hypothesis of parity (the one-tail test) follows from the FCC's statement: "to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, the Commission generally need not look any further."[308]

225. The FCC has not expressly required the use of a one-tailed test in measuring performance for determining Section 271 applications. In the first successful Section 271 application, the FCC noted that two tailed testing includes:

> the attractive feature that the interests of the incumbent LEC and the competitive LECs are given equal weight, so that the probabilities of falsely concluding the incumbent LEC may be discriminating and of missing existing discrimination are balanced (so á = â) [á and â are symbols for Type I and Type II statistical errors, respectively]. Such an approach could be used in future section 271 applications.[309]

226. Nevertheless, the FCC has not decided a performance issue in a Section 271 application that uses two-tailed testing. [310] Qwest maintains that the Commission therefore should follow the FCC's established statistical methodology. Qwest also maintains that using the two-tailed test changes Qwest's burden of proof to a higher standard than the preponderance of the evidence.[311]

227. The only evidence concerning control of Type II errors (false passes) was a 1998 affidavit from an AT&T Labs statistician, Colin Mallows, in an FCC docket not involving a 271 application, to justify the one-tailed test.[312] Qwest acknowledged that it has not calculated the Type II error for its test.[313] Department witness Ms. Murray explained that the level of Type II error for a one-tailed test at the 95% confidence level depends on factors specific to each application of the test, such as sample size.[314] Qwest has provided no factual basis for concluding that the one-tailed test poses a fair balance of Type I and Type II errors.

228. Qwest points out that the one-tailed test is used for determining compliance with the performance assurance plan (PAP) that implements the "anti-

backsliding" provisions of the Act. [315] The Department points out that penalties are applied for any substandard measure in any month under the PAP, even if Qwest were otherwise performing flawlessly. [316] By contrast, Qwest is not being penalized where it has merely failed to carry its burden of proof. Under the PAP, the burden of proof is on the party challenging Qwest's performance and the one-tailed test with a 95% confidence level is the test used to demonstrate that Qwest is failing to meet the PAP standards. The Department and AT&T have demonstrated that the use of the one-tailed test establishes an inherent bias that shifts the burden of proof on performance issues from Qwest to the other parties in the proceeding.

229. Qwest disputes these characterizations of the PAP and maintains that:

> Moreover, the statistical analysis employed by Qwest in its performance data (Exhibit 10) and Blue Chart (Exhibit 151) is more stringent than that set forth in the PAP. The PAP utilizes a higher confidence level (over 99%) to evaluate certain high volume PIDs such as trouble rate (MR-8).[317]

230. Using a higher confidence level in evaluating high volume PIDs in a one-tailed test merely means that occurrence of Type I errors (false fails) is even less likely. With a 99% confidence level, out of 100 samples only one will show a false fail. The test does not address the occurrence of Type II errors (false passes) at all. The higher confidence level in the PAP translates into a higher burden on the party challenging Qwest's performance-not an assurance that Qwest's performance data is reliable. The issue of whether Qwest is affirmatively demonstrating compliance with a performance measure through a statistical test does not arise in the one-tailed test.[318]

231. The Department has demonstrated that the dual hypothesis test is a more accurate means to determine whether Qwest has demonstrated compliance with performance measures. Qwest has demonstrated that the one-tailed test has been found adequate by the FCC, the ROC, and other states in Qwest's region for measuring performance. The FCC has described as an "attractive feature" of the Type II test, the treatment of the interests of ILECs and CLECs "so that the probabilities of falsely concluding the incumbent LEC may be discriminating and of missing existing discrimination are balanced."[319] Ultimately, the decision of whether to adopt this test is up to the Commission.

Performance Indicator Definitions.

232. To make a *prima facie* showing that it is in compliance with the Section 271 checklist requirements, Qwest must show that (1) the PID measures accurately and completely capture the checklist requirements, (2) the underlying data are reliable and have been properly reconciled with the experience of Minnesota competitors, and (3) with a reasonable degree of certainty, Qwest passes the PID measures on a sustained basisand therefore provides competitors with service at least at parity with the service that it provides for its own retail operations.[320]

233. The PIDs are an evolving set of measures of the quality of Qwest's commercial performance in providing wholesale products (resold local exchange services, unbundled network elements ("UNEs") and interconnection) to competitive local exchange carriers ("CLECs"). Counted separately by measure, submeasure and product, Qwest is reporting over 850 performance measures.[321]

234. The reported PID measures fall into several categories, based on the standard against which they are measured. Most are designed to determine whether Qwest's performance in providing wholesale services, UNEs and interconnection to its competitors is at least at "parity" with (*i.e.*, at least as good as) the service that Qwest "provides to itself" when it serves retail customers. In another group of measures, Qwest's performance is measured against a benchmark standard.[322]

235. For performance measures with a benchmark standard, Qwest would be considered to "pass" when the wholesale performance meets the established performance benchmark.[323] Each month, Qwest separately measures the average performance, as well as the variation in performance, on a given PID for its retail and wholesale operations. Qwest then performs a statistical test to determine whether the difference between the two average performance levels indicates discrimination against competitors.[324]

PID Results.

236. Qwest's PID results for the period through July 2002 show numerous PIDs in every month (about a quarter of all PID measures and submeasures) for which the data, assessed using the one-tailed test, show performance on behalf of competitors inferior to performance on behalf of its retail operations.[325] This overall conclusion holds whether one examines the most recent four months of results or the most recent nine months of results.[326]

237. Applying the two tailed test of statistical significance urged by the Department and AT&T results in the same conclusion in all material respects. Using the two-tailed test demonstrates the parity PID performance failures to be competitively significant. Only an average of seven or eight of the test failures per month are competitively insignificant by this test.[327]

238. Qwest is not required to meet the performance objective for each and every measure. Even when statistically significant differences in performance exist, the Commission may "conclude that such differences have little or no competitive significance in the marketplace."[328] Similarly, a steady improvement in performance over time can indicate that problems are being resolved.[329] In such cases, "the Commission may conclude that the differences are not meaningful in terms of statutory compliance."[330] Qwest maintains that the PIDs not met are either not statistically significant or not competitively significant.

239. The FCC has not provided clear guidance as to the weight to be afforded noncompliance with performance measures. Even if a BOC consistently misses the

performance objective for an entire product category, the FCC has concluded that the BOC can satisfy the checklist item as a whole.[331] On theother hand, passing a performance measure does not guarantee a finding of checklist compliance.[332]

240. Five general questions apply in the assessment of performance measures. First, does the PID actually provide a meaningful measure of an activity important to the provision of a checklist item. Second, is the data produced for the measure of that PID reliable. Third, has the performance measure been met using whichever standard is chosen by the Commission. Fourth, where the standard is missed, was the level of performance provided “competitively significant.” Fifth, where the performance standard is not met and the Commission determines that the performance is competitively significant, whether the totality of the evidence shows that Qwest meets or fails to provide the particular checklist item. These general questions are applied to the particular measures of each checklist item and the functioning of a BOC’s operational support system in subsequent findings.

OSS Standards.

241. The FCC uses the term Operational Support Systems (“OSS”) to refer to a variety of systems, databases, and personnel used by a Bell Operating Company (BOC) to provide services to customers.[333] Although OSS is not mentioned in the Telecommunications Act of 1996, the FCC has held that incumbent LECs must provide nondiscriminatory access to OSS pursuant to sections 251(c)(3) and 252(d)(1).[334] For that reason, the FCC considers access to OSS as a part of Checklist Item 2, which requires that Qwest provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[335] FCC orders provide that Qwest must provide CLECs access to five OSS functionalities: pre-ordering, ordering, provisioning, maintenance and repair, and billing.

242. The nondiscrimination provisions of Section 271(c)(2)(B)(ii) apply to OSS provided to CLECs in the form of analogous functions provided by a BOC to itself, its customers, or its affiliates. This standard requires a BOC to offer requesting carriers access that is equivalent to the services it provides itself in terms of quality, accuracy, and timeliness. The FCC has indicated that “equivalent access” means a BOC must provide access that permits competing carriers to perform OSS functions in “substantially the same time and manner”as the BOC.[336] Where an OSS function has no retail analogue, the FCC requires that the BOC offer access sufficient to allow an efficient competitor a meaningful opportunity to compete.[337]

243. The FCC uses a two-step approach to determine if a BOC meets these nondiscrimination standards. First, the FCC evaluates whether the BOC has deployed the necessary systems, databases, and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them.[338] This part of the FCC’s inquiry includes determining whether the BOC has developed sufficient electronic and manual interfaces, and whether the BOC

has provided internal business rules and other formatting information necessary to ensure that a carrier's requests are processed efficiently.

244. Second, the FCC determines if the deployed OSS functions are operationally ready as a practical matter.[339] This part of the FCC's inquiry involves an examination of performance measures and other evidence of commercial readiness to determine whether a BOC's OSS is handling current demand and will be able to handle reasonably foreseeable future volumes.[340]

245. The FCC has indicated that the most probative evidence that OSS functions are operationally ready is actual commercial usage.[341] Absent sufficient and reliable commercial usage data for assessing the operational readiness of a BOC's OSS, the FCC has considered the results of carrier-to-carrier testing, independent third party testing, and internal testing.[342]

246. Qwest has relied upon different types of evidence in support of its assertion that it provides CLECs with nondiscriminatory access to its operational support systems ("OSS"). The evidence that Qwest has submitted on this issue includes the affidavits and testimony of Lynn Notarianni, Judy Schultz and Alan Zimmerman, Qwest performance measurement results, and the results of the OSS Test that was conducted by the Regional Oversight Committee (the "ROC OSS Test"). The final report of the ROC OSS Test is KPMG Consulting's ("KPMG") "Final Report Regarding Qwest Communications OSS Evaluation" (the "KPMG *Final Report*").

PreOrdering.

247. Covad asserts that its line sharing orders are rejected because of discrepancies between the address on a customer's CSR and the address returned by Qwest's pre-order address validation query ("AVQ"). Covad proposes that CLECs be able to place line sharing orders using only the customer's telephone number ("TN ordering") or, alternatively, using the telephone number and the street address for the customer (address validation light or "AVL"). Qwest currently requires that CLECs also include the end user's full name and address with line sharing orders. This requirement is, in Covad's opinion, a needless complication of the process and results in a series of rejected orders when minor discrepancies arise between the order information and the precise listing of the end user's address in Qwest's files.[343]

248. Qwest proposes that CLECs need merely check the end user's CSR, prior to placing the order. Covad objects to this proposal, maintaining that it has no way of determining that the CSR and the validation database may not match.[344] Covad also objects to the process as being needlessly burdensome, asserting that Qwest has not offered in this proceeding a legitimate reason for needing the end user's address on the order in the first place. Covad notes that BellSouth offers TN ordering to its ISP partners.[345] Similarly, Covad maintains that AVL is offered by SBC to CLECs as an ordering option.[346]

249. Qwest maintains that only two examples of order rejection due to mismatched CSRs and AVQs have been identified in Minnesota.[347] Qwest has examined the two examples cited by Covad and demonstrated that neither arose from a discrepancy that Qwest is responsible for.[348] The paucity of order rejections associated with this issue demonstrates that it is, at most, an isolated problem. There has been no showing that TN ordering or AVL ordering is a requirement for Section 271 approval.

Ordering and Provisioning.

250. To evaluate whether a BOC provides nondiscriminatory access to ordering functions, the FCC has stated that it "looks primarily at the BOC's ability to return order confirmation notices, order reject notices, order completion notices and jeopardies, and at its order flow-through rate."[349]

251. For the ordering function, the process can be done either electronically or manually. The alternative to manual handling of orders is electronic flow through. Electronic flow-through of local service requests ("LSRs") refers to Qwest's processing of electronically-transmitted CLEC LSRs directly from the electronic gateway interface to the service order processor ("SOP") without human intervention or manual retyping. The PIDs include two measures of Qwest's success at electronic flow-through: PID PO-2A, which measures Qwest's overall electronic flow-through rates, including orders that are not designed to flow-through and orders that CLECs specifically requested to be handled on a manual basis; and PO-2B, which measures the percent of flow-through-eligible LSRs that flow-through.[350]

252. An order that fails electronic flow-through to Qwest's OSS will fall out to manual handling. Manual handling of an order creates a greater likelihood of human error than electronic handling. Qwest witness Lynn Notarianni admitted that when "…starting from a manual process, you do have more opportunity to make the mistakes."[351] Qwest witness Alan Zimmerman noted that, for example, Qwest's use of an automated rather than a manual process for access billing would reduce the likelihood of errors in switched access records provided to CLECs.[352] Human errors due to manual handling are costly in time and money to CLECs, hampering their ability to enter the current Qwest-dominated local market.

253. The FCC has stated that flow-through rates are a means to determine "a wide range of possible deficiencies in a BOC's OSS that may deny an efficient competitor a meaningful opportunity to compete in the local market."[353] The FCC views OSS as an essential service, and has determined that without nondiscriminatory access to a BOC's OSS, CLECs would be at a severe disadvantage when competing in the same market as the BOC; and possibly even precluded from competing at all.[354]

254. AT&T asserts that the rate of CLEC orders that Qwest manually handles is too high.[355] At least 37% of all orders that CLECs send to Qwest fall out from Qwest's OSS and are manually processed by Qwest personnel.[356]

255. Manual processing, by nature, increases the likelihood of delays and errors in provisioning.[357] KPMG conducted testing to assess the degree of error present in Qwest's processes for manually completing orders.[358] Qwest cited human errors and/or inadequate training as a source of various problems noted in 75 exceptions and observations that KPMG issued during the ROC test.[359] Despite Qwest's assurance that it had implemented "training and quality assurance measures" to correct the human errors and inadequate training, KPMG continued to find manual errors on approximately 15 percent of the orders that it reviewed, resulting in KPMG's issuance of another observation at the end of May 2002 (Observation 3110).[360] Although KPMG found that further retesting was needed, Qwest requested that the observation be closed, rather than allow a retest.[361] KPMG's Final Report thus expressed concerns about the "numerous problems with manually handled orders" during the test and urged regulators to closely scrutinize Qwest's flow-through performance in light of those problems.[362]

256. System deficiencies were discovered by KPMG when supplemental LSRs[363] were submitted for UNE-P residential orders, two-wire non-loaded business and residential orders, analog business and residential loop orders, DS-1 business loop orders and multi-line UNE-P business customer services orders.[364] After tests were completed and the results known, Qwest admitted that these types of orders would fall out of the electronic system and would have to be manually processed because the Qwest flow-through system was incapable of finding (and canceling) the original LSR.[365] But, rather than implement a set of procedures to fix the supplemental order problems and identify original LSRs, Qwest revised its flow-through documentation and notified competing carriers that supplemental LSRs were no longer eligible for flow-through.

257. Subsequent to Qwest's documentation change, KPMG excluded from its reported test results all of the affected LSRs and thereby lowered the bar for Qwest, allowing the Company to artificially increase its flow-through test scores (*i.e.*, PO-2B).[366]

258. Qwest's total LSR fall-out rate due to ineligibility at the EDI was nearly 24% and 34% for May and June 2002, respectively. At the Graphical User Interface (GUI), total LSR fall-out rates were 37% and 38% for the same two months.[367]

259. The Department of Commerce asserts that the ineligible LSR rate is too high to support approval of Qwest's ordering process. By comparison, Verizon - Maryland reported combined overall LSR ineligibility rates of 14% and 13% at both the EDI and GUI for February and March 2002, respectively.[368] Thus, the rate of LSRs submitted by CLECs in Maryland that were ineligible for flow through was roughly half the rate of ineligible LSRs submitted by CLECs in Minnesota.[369]

260. Qwest compared its flow through rate with those of Verizon in Massachusetts, showing that the FCC approved Verizon's application for that despite it having achieved overall electronic flow-through rates for ordering of only 46-49% for

resale and 51-55% for UNEs.[370] The FCC had characterized that Massachusetts performance as "low *average* total flow-through rates."[371]

261. The overall flow-through rate in the Massachusetts data is from the FCC's *Verizon Massachusetts Order*, which was adopted and released in April 2001, and was based on evidence on flow-through performance dating back to September through December 2000, two years earlier than today.[372] The Department of Commerce asserts that OSS ordering systems are a relatively new and still-evolving information systems function that can and should be expected to perform significantly better today than in year 2000. While the FCC has not issued a decision on Verizon's 271 application for Maryland to date, when it recently approved Verizon's 271 application for Delaware and New Hampshire, it did so based upon commercial flow-through rates that were generally above 90%, which Verizon has been achieving in the February through June 2002 timeframe.

262. The FCC considered Qwest's flow through percentages in the *Qwest Nine State Order*. The percentages of fall out were identified in a number of significant areas.[373] Qwest's overall percentages were favorably compared to those of Bell Atlantic in the first Section 271 Application granted.[374] The standard applied by the FCC clearly does not impose a higher standard for later improvement.

263. During the OSS test, Hewlett-Packard ("HP"), acting as a pseudo-CLEC, submitted a large number of LSRs requiring manual handling. These LSRs, according to KPMG, fall into three categories: (1) orders entered manually that are designed to be processed manually, (2) orders entered electronically that are designed to be processed manually, and (3) orders entered electronically that are designed to flow through, but "fell out" for manual handling.[375]

264. After submitting these LSRs, HP detected a number of errors.[376] When asked to research the incorrect LSRs, Qwest acknowledged that representatives in its service centers had made errors.[377] In addressing the situation, Qwest implemented training programs and enhanced training materials for manually processing LSRs.[378] KPMG concluded that it was "not able to determine if the changes made by Qwest were effective in actually reducing the number of rep errors" and declined to express an opinion as to Qwest's performance in this area.[379] KPMG opined that, after reviewing the "enhanced rep training" that "if properly executed, the revised training regime could operate to reduce the likelihood of rep error."[380]

265. The ROC commissioned a separate study report known as the "Qwest Manual Order Entry Performance Indicator Description Adequacy Study" (Adequacy Study).[381] The purpose of the Adequacy Study, as expressed by the ROC Steering Committee, was to determine if "adequate performance measures are in place to monitor manual order handling on a going-forward basis."[382] Moreover, KPMG's stated objective in conducting the study was to "express a professional opinion on the adequacy of existing and proposed performance measures to monitor the effectiveness of manual order handling by Qwest."[383]

266. At the conclusion of the study, however, KPMG decided to “express no opinion on whether or not existing measures, as implemented, actually accomplish their objective as stated in the PID.”[384] KPMG determined that new PIDs should be defined for four outstanding issues related to manually handled orders, and that PIDs OP-3, OP-4, and OP-15, all related to manual handling, should be further disaggregated for reporting.[385]

267. AT&T conducted a controlled test ("UNE-P Test) of interconnection in Minnesota from June through December 2001.[386] Based on the results of this testing AT&T maintains that the results of the test demonstrate that too many orders fall out for manual processing and that Qwest’s process for handling manual transactions is insufficient to support interconnection in commercial volumes. Qwest asserts that, as a result of the UNE-P Test, the problems that were identified have been fixed.[387] The FCC cited the UNE-P Test as support for finding that Qwest's manual processing is acceptable, stating:

> We are further assured of Qwest’s accuracy in manually processing orders by the results of AT&T’s UNE-platform trial in Minnesota. Specifically, during this trial AT&T submitted thousands of LSRs for UNE-platform orders and verified that Qwest provisioned exactly what it had ordered on the LSR, including the features on the LSR. AT&T’s UNE-platform trial was conducted in two phases: Phase 1 captured data from June to October 2001, and Phase 2 captured data in mid-November and December 2001. We note that, although AT&T conducted this trial only in Minnesota, the results reflect Qwest’s ability to accurately process orders across its region because LSRs are centrally processed by the same personnel, in the same ISC, using the same systems and processes, regardless of the state. During this UNE-platform trial, AT&T found that Qwest’s accuracy rate ranged from 97.81 to 99.49 percent. Significantly, Qwest’s accuracy rate for manually-processed orders alone ranges from 96.93 to 98.46 percent.[388]

268. When people are involved in the processing of orders, errors are inevitable. People will mistype information, fail to include all of the required information or misapply business rules in the population of fields. To reduce the amount of errors, it is desirable that Qwest’s OSS process CLEC orders without the need for human intervention. Unfortunately, Qwest’s high rate of manual processing exposes CLEC orders to the errors that humans are certain to make. In addition, a need for manual intervention can severely restrict the number of CLEC orders that an ILEC can process in a day and severely impact the emergence of competition. Further disaggregation of the PIDs measuring manual handling would be helpful in improving the identification of problem areas. This effort is needed to comply with the FCC’s directive in the *Qwest Nine State Order* that the overall level of manual handling be reduced. But the degree of manual handling is not, by itself, reason to recommend that Qwest not be granted Section 271 authority.

Impact of Pending Orders.

269. Qwest rejects Covad's line sharing orders whenever the end users to be served also have pending local voice service orders.[389] This rejection occurs even when the pending order is to discontinue Qwest DSL service. Under the PIDs, Qwest must commence provisioning orders and counting the days for the applicable intervals (i.e., PO-5, OP-4, etc.) upon receipt of a complete and accurate LSR. There is no exception in the PIDs for the existence of a pending order to delay the provisioning interval.

270. Qwest asserts that if Covad were to follow the proper process, its orders would not be rejected. Qwest maintains that pending orders require manual handling of any subsequent order to ensure accuracy.[390] In Covad's case, if the line-sharing order is submitted and there is a pending order for the voice line, the line sharing order cannot process accurately until the voice order has completed. Qwest maintains that, in such cases, the line sharing order is rejected, with a message that includes the due date of the pending order. According to Qwest, Covad is then required to resubmit the order and increment the version number.

271. In actual practice, CLECs are told to resubmit the order afterthe Qwest DSL disconnect is complete.[391] All Covad LSRs that are rejected because of pending orders, and not because of an inaccuracy or incompleteness in the LSR, should be reflected as a failure of a PID standard. Instead, Qwest does not count the time between the reject and re-placement of the order, thereby obtaining an undocumented extension of the applicable installation interval. With this process in place, Qwest performance reporting has been shown to be inaccurate and unreliable on OP-4 for DSL.

272. Qwest's rejection of LSRs also occurs in the context of Covad's ordering of line shared loops. In these situations, Covad's request for access via the LSR is only to the high frequency portion of the loop, and thereby does not affect the voice service at all. Covad's request is for a UNE that has no impact whatsoever on the existing voice service. Qwest has not shown a valid technical reason for excluding Covad's line shared loop orders based on a pending voice LSR.

273. Qwest has not demonstrated that a business reason exists for requiring the end-user customer to have completed the disconnection from Qwest's DSL product before Qwest will even accept an order from a competitor for line sharing over the same loop. The nature of this business practice creates an inherent barrier to CLECs attempting to enter the DSL market.[392]

Installation Service Quality.

274. The OP-5 Performance Indicator Definition ("PID") measures the New Service Installation Quality. The OP-5 PID "[e]valuates quality of ordering and installation of services, focusing on the percentage of average monthly new order installations that were free of trouble reports for thirty (30) calendar days following

installation, including the percentage of new service installations that experienced a trouble report on the installation date after the order is reported as work complete by the technician."[393] Qwest interpreted the PID to exclude out-of-service conditions that are cured through the creation of a service order.[394] Those instances are not considered a trouble report for the purposes of the OP-5 measurement.[395] Out-of-service conditions that are cured through the creation of a service order would not be captured in any of the PIDs.[396]

275. Liberty Consulting's witness testified that he did not recall representatives from Qwest ever explaining clearly that out-of-service conditions experienced within the first 72 business hours of installation that were corrected through service orders would be excluded from the OP-5 measurement.[397] Liberty Consulting's witness also testified that he did not recall whether or not the OP-5 data that was examined as part of the OP-5 audit excluded troubles that were cured through the creation of service orders.[398] Notwithstanding this lack of knowledge that Qwest had been excluding troubles cured through the creation of service orders from the OP-5 results, the Liberty Consulting witness stated, "if any information was excluded that should have been included in the performance measure, there would have been a problem, regardless of how numerous they were."[399]

276. Qwest has acknowleged that OP-5 does not capture all reported troubles.[400] Qwest proposes to begin capturing this order accuracy data from July 2002 forward.[401] This additional data was specifically requested by the FCC.[402] Based on Qwest's assurance that this data would be collected, the FCC concluded that concerns about OP-5 "appear to be resolved."[403] While the exclusion of data creates uncertainty about the utility of the OP-5 measurement, that uncertainty is insufficient to demonstrate that Qwest has failed to provide parity in new service installation.

277. Similar arguments were raised by the parties regarding the accuracy of PO-20 (Manual Service Order Accuracy). The FCC analyzed the issues in the same fashion as those regarding OP-5.[404] While the PID is incomplete, the data was deemed sufficiently reliable for assessing Qwest's record on manual handling of service orders.[405]

Firm Order Commitments.

278. After receiving a valid LSR, Qwest issues a firm order commitment ("FOC") back to the CLEC. Within the FOC notification, Qwest commits to a service delivery date or due date. The due dates allow CLECs to make internal plans for installing services for its customers. As amendments to due dates become known, Qwest issues subsequent notifiers so that all interested parties can make adjustments.

279. PO-15 measures the number of *Qwest-caused* due date[406] changes per order submitted by a CLEC. According to Qwest's own PID reports for Covad, in almost every one of the past twelve months, Qwest is making more due date changes per Covad order than for its own orders.[407] In June, 6% of Covad's orders received multiple Qwest-caused due date changes, which equated to three times the number of

due date changes for Qwest's retail orders.[408] In May, 32% of Covad's orders received multiple Qwest-caused due date changes, which equated to more than ten times the number of due date changes for Qwest retail orders.[409] In April, 24% of Covad's orders received multiple Qwest-caused due date changes, which equated to eight times the number of due date changes for Qwest retail orders.[410] In March, 30% of Covad's orders received multiple Qwest-caused due date changes, which equated to more than seven times the number of due date changes for Qwest retail orders.[411] Qwest's performance fails the parity measure regarding Covad orders and that failure has been statistically significant.

280. Qwest maintains that many of the due date changes are related to improving due dates associated with conditioning (i.e., removing bridged tap and load coil). Qwest's data analysis performed for May 2002 indicates that 61% of the time when there is a due date change, the order is completed prior to, or on the original due date.

281. Covad-specific PID Reports show that Qwest sends an initial FOC with a committed due date. Subsequently, Qwest then sends Covad another FOC with a new committed due date. Qwest's position is that the second FOC should not be recorded as a performance measure failure if the ultimate delivery is not later than the date in the original FOC.

282. With the receipt of multiple FOCs, Covad is left with the burden of determining the actual delivery date. This burden includes explaining to Covad's customer that the date for the delivery of the purchased DSL loop must be rescheduled due to the revised due dates in multiple FOCs. Covad must also coordinate the availability of the loop with the customer's ISP. Changing due dates can damage relationships with ISPs, who are as dependent as the customer on the availability of the loop to provide DSL services.[412] Unilateral changes to the loop availability date by Qwest can create a poor business image for Covad. Under these circumstances, the opportunity for gamesmanship arises whereby Qwest can harm a competitor by conduct that, in Qwest's view, constitutes parity. The potential damage to Covad's business reputation creates the opportunity for anticompetitive behavior that would encourage the customer to opt for Qwest as that customer's DSL provider.[413]

283. Before an FOC is sent to a CLEC, an ILEC should have already determined that (1) the order was properly filled out by the CLEC, and (2) that the order can be fulfilled by the ILEC on a date specified on the FOC. Qwest's practice of sending multiple FOCs suggests that it is not doing the preliminary work necessary before it sends the first FOC to the CLEC.[414]

284. The FCC explicitly addressed the issue of multiple FOCs in the ordering process, stating:

> Specifically, Covad states that on numerous orders, after receiving an initial FOC with a committed due date, Qwest sends Covad a second FOC with a new committed due date. The record shows that for some of the unbundled loop

> products that Covad orders, Qwest sends – at Covad's request – a second FOC with a new due date to Covad when Qwest finds that facilities are unavailable. The record further shows that for line-sharing products, multiple FOCs are often returned if, during the conditioning evaluation, Qwest determines that bridge taps and load coils need to be removed, since there is a fifteen-day standard interval for removing bridge taps and load coils. If Qwest can complete the work early, the competing LEC receives an additional FOC with an improved due date. In light of these explanations, we do not conclude that multiple FOCs sent by Qwest is an indication of discriminatory access to OSS.[415]

285. While Covad has demonstrated that the FOC procedures can harm its business, this situation is attributable, at least in part, to Covad. The use of multiple FOCs does not constitute a failure to meet OP-15.

Service Order Completion Notices.

286. Qwest measures its line shared loop interval from receipt of a complete and accurate LSR to the issuance of the SOC.[416] Because Qwest auto-completes every line shared loop order and issues the SOC systematically and automatically on the due date provided in the FOC rather than when work is completed[417] (unless the order is placed in jeopardy), Qwest will *always* meet the due date. Covad maintains that this line shared loop installation practice results in artificial performance measurements that will always be excellent and in perfect conformance with the PID requirements even if Qwest's actual performance is not.[418] To provide an accurate measurement of the interval, Covad proposes measuring the period between Qwest's receipt of a complete and accurate LSR and the router test showing that the work on the loop is actually complete.[419]

287. Qwest generally described its measurement of the provisioning interval as appropriate.[420] The FCC addressed the issue as follows:

> Based on the evidence in the record, we find that Qwest is providing timely and accurate service order completion notices (SOCs). We reject commenters' arguments that we should find checklist non-compliance because Qwest has issued SOCs prior to the actual completion of line-sharing and UNE-platform orders. For line-sharing orders, the record shows that Qwest has identified the problem, and has taken the necessary steps to control and correct it. For SOC notices sent for UNE-platform orders, the record shows that in limited situations, Qwest may complete a service order though the order is in jeopardy status. Given that this problem affects only a *de minimis* number of orders, we decline to find that this issue warrants a finding of non-checklist compliance. If this problem should increase in scope, however, we will not hesitate to take enforcement action under our section 271(d)(6) authority.[421]

288. The record in this matter on the subject of SOCs is the same as that in the *Qwest Nine State Order*. There is no reason to believe that the FCC will treat this issue

any differently in Qwest's application for Section 271 approval for Minnesota. Qwest has demonstrated that its provision of SOCs meets the FCC's standard.

Local Number Portability Orders and Repairs.

289. Liberty Consulting's confusion about how Qwest was treating troubles cured through the creation of a service order also extended to the local number portability measures OP-17 Timeliness of Disconnects Associated with LNP Orders and MR-11 LNP Trouble Reports Cleared within 24 Hours. When a soon-to-be CLEC customer has no telephone service because Qwest prematurely disconnected the service, Qwest's process requires the CLEC to call the interconnect service center, open an escalation ticket and follow up the escalation ticket with a supplemental LSR.[422] For the purpose of the OP-17 measurement, the Qwest witness equated a CLEC's call to the Qwest call center identifying an out of service condition associated with a premature disconnection of the customer's service with a trouble report.[423] The Qwest witness also indicated that trouble reports opened with the Qwest repair center as a result of a premature disconnection of a customer's service associated with the porting of a customer's service would be an exception and that a call center ticket opened at the interconnection service center would be more "the rule."[424]

290. Liberty Consulting did not share Qwest's understanding that, for the purpose of the OP-17 measurement, Qwest equated a CLEC call to the Qwest call center to report an out-of-service condition with a trouble reported created at the Qwest repair center. As an initial matter, the Liberty Consulting witness testified that he was unsure if the Liberty Consulting personnel had reviewed the process that CLECs are required to follow to report instances of a premature disconnection.[425] A review of Liberty Consulting's report on the audit of the OP-17 and MR-11 performance measurements shows that Liberty initially did not review or did not understand the process the CLECs are required to follow to report instances of premature disconnection. In its report on the OP-17 and MR-11 performance measures, Liberty stated:

> Subsequent to Liberty's audit of OP-17A (and OP-17B) and its data tracking work, Qwest made changes to its methods to derive the new OP-17 measures. Reportedly, Qwest has begun to include a new data set in results reported for OP-17 beginning with June 2002. Specifically, Qwest now captures data for and includes in the measure those situations in which a disconnect-in-error is resolved via a call to Qwest's escalation call center. As noted above, previously Qwest only included cases in which the trouble desk opened a trouble report upon customer request.[426]

291. Qwest responded that Bob Stright testified regarding the Liberty audit of the measure and ensured data was pulled from all appropriate sources.[427] Qwest also maintained that, while the measure had changed slightly on two occasions in the last six months, the data continuously showed 99.99% of ported numbers disconnected at the appropriate time.[428]

292. Liberty Consulting's witness also testified that prior to June of 2002 Qwest was not including instances of disconnect-in-error that were resolved via a call to Qwest's escalation call center.[429] Qwest's witness testified that the majority of disconnect-in-error conditions would be resolved via a call to the Qwest service center and would not require a trouble report.[430]

293. The ultimate issue is whether Qwest is meeting the 98.25% ROC determined performance benchmark on OP-17. But the data used to make the showing must be reliable. Unreliable data would not support a finding that Qwest has demonstrated compliance with the performance benchmark. The manner in which the OP-17 PID measures disconnects excludes an entire category of disconnects based on the reporting system established by Qwest. This excluded category may well constitute the majority of untimely disconnections.

294. The flaws in the OP-17 PID were recognized and the PID was revised in May 2002.[431] The revised PID showed a number of disconnects that were excluded from the calculation due to the limitations in the PID.[432] In response to the audit results, Qwest modified its data collection methods to include contacts with Qwest's escalation call center. Liberty noted the change, but did not audit the latest data collection change to ensure that the contacts were being captured in the PID.[433] The record in this matter shows that Qwest has modified OP-17 to capture the information needed to assess the disconnect metric accurately. AT&T has not identified any information in the record to conclude that the modified PID fails to capture the formerly excluded disconnects.

Maintenance and Repair.

295. Another OSS function tested under the ROC is maintenance and repair. MR-8 (Trouble Rate) compares the relative trouble rates for wholesale and retail offerings.[434] MR-8 is a key indicator of the quality of maintenance and repair service. Qwest fails to meet the parity standards (under the two tail test) for MR-8 for over half the products measured. In June, Qwest failed this PID for six out of the ten largest products (by volume in service, which is the denominator of this PID). Qwest has, on average over the last four months, failed MR-8 for almost two-thirds of the Checklist Item 14 products (resale) and for two-thirds of the Checklist Item 2 products (UNE-P) using the two-tail test. Qwest has failed this PID using the two-tail test in each of the last nine months for business resale and UNE-P Centrex and for each of the last five months for UNE-P Centrex 21.[435]

296. Using the one-tail test, Qwest fails to meet the parity standards for MR-8 for around 40% of the products on average. Qwest has, on average over the last four months, failed MR-8 for half of the Checklist Item 14 products (resale) and for two-thirds of the Checklist Item 2 products (UNE-P) when measured using the one-tail test.

297. Qwest consistently failed to meet parity for many products over the last six months (or more), including business resale, UNE-P Centrex and UNE-P Centrex 21.[436] Qwest's witness on performance testified that Qwest had missed (by its own

test) on MR-8 for UNE-P Centrex[437] in every month from August 2001 to July 2002, and hence, the misses are not isolated.[438]

298. Qwest responded that the FCC has considered the same sort of performance in the *Qwest Nine State Order* and found that Qwest's failure to achieve parity in maintenance and repair was not sufficient to show checklist noncompliance. In the main, the FCC relied upon the limited amount of competition in most areas to conclude that the performance failures do not warrant denying Qwest's application.[439] In the reaching this conclusion, the FCC accepted Qwest's assertion that much of the disparity is attributable to "no trouble found" (NTF) results of service calls. Covad maintains that Qwest technicians improperly report calls as NTF when a problem actually exists, thereby requiring a second or third dispatch of the technician. There is no ROC-accepted measure of treating NTF results that would identify when there is actually no problem and when the technician has failed to identify the problem that exists.[440]

299. Qwest acknowledged that it has had some difficulty consistently meeting repair measurements for line sharing,[441] but contended that it had implemented a new process of classifying line sharing troubles[442] that has fixed the problem. Qwest implies that the performance results for line sharing in August 2002 (the first month for which the new process was in place) shown in Ex. 185 support the conclusion that this problem is resolved.[443] Covad maintains that those results do not reflect its experience,[444] because Covad does not open trouble tickets on line sharing, but rather engages in "repair sharing" which consists of a joint meet in the central office to resolve problems.[445]

300. While Covad maintains that it entered into the practice of "repair sharing" by agreement with Qwest,[446] Qwest vigorously disputes that that this practice was done with the agreement and knowledge of Qwest management.[447] The record demonstrates that the process was engaged in *ad hoc* between lower level personnel. While this practice has prevented the capture of all relevant line sharing troubles, the practice was implemented at Covad's request. Under these circumstances, the failure to capture repair tickets should not be treated as a past problem. The evidence from the new process is adequate to support Qwest's position on line sharing repair performance.

301. The results provided from MR-8 for a variety of Qwest products show that Qwest is not meeting parity in maintenance and repair standards between its own retail and CLECs. Even when the one-tail test is used (treating unidentified results as passing) Qwest fails to meet the parity standard that has been established by the FCC as the requirement for obtaining Section 271 approval. There is no meaningful difference between the Minnesota record and the record in the *Qwest Nine State Order*. The FCC credited Qwest's explanations for failing to meet the parity standards and approved the application. While the record shows a lack of parity, there is no clear showing that the lack of parity is competitively significant. There is no reason to believe that the FCC will take any different approach to the record established in this proceeding.

Billing.

302. Qwest tracks how timely and completely it bills for services it provides to CLECs. Qwest provided CLECs with timely access to usage records, providing billing records to CLECs in less than 3 days, substantially faster than the retail average of about 6-days.[448] Qwest tracks 8 metrics concerning billing.[449] Of those, 4 met the ROC performance standard in 3 of the last 4 months, 1 had no data at all, and three missed the performance standard. One of those misses (BI-4A) had a higher 4-month average for CLECs than for retail customers.

PID BI-3 (Billing Accuracy - Adjustments for Errors).

303. Qwest maintains that the statistics for billing accuracy (BI-3) show that Qwest has narrowly missed the ROC performance standards. Qwest asserts that the volumes in billing are "so enormous that this inconsequential difference shows up as statistical disparity … [that] is inconsequential and certainly not competitively significant.."[450] But Qwest employs an elaborate system of CLEC payments for resale rates, reconciliation spreadsheets, and Qwest true-up “credits” to the TELRIC rate[451] Some of this activity was conducted outside of its normal billing adjustment procedures. Qwest reports essentially 100% billing accuracy in its PID BI-3 (Billing Accuracy – Adjustments for Errors).[452] This level of billing accuracy cannot have been obtained without excluding the adjustments and true-ups that were incorporated into the UNE-Star billing system. The amount of money credited back through these procedures, if properly accounted for in the results, would clearly has a large impact on Qwest’s BI-3A results.

304. As discussed in Checklist Item 2, Qwest offered the UNE-Star product to McLeod and Eschelon as a substitute for UNE-P. The billing for that product was done as regular resale product and a subsequent true-up. The true-up applied the further discount to reflect the lower price that true UNE-P billing affords (and to account for Qwest's inability to provide accurate DUF records).

305. There was no confusion on the part of the Qwest employees who implemented the UNE-Star product for Eschelon as to what methods were being used to order, provision, and bill UNE-E. On January 11, 2001, a Qwest employee emailed Eschelon with a description of the activities of the Qwest Process Implementation CORE team (described as having “35+ players” representing every significant interconnection division, as well as Compliance, Regulatory, and Public Policy).[453] The CORE team provided updates to an executive management team. The resolution of short term objectives was described as follows:

How will orders be placed by Eschelon?	Through existing resale process.
How will Qwest process orders?	Through existing resale process.
How will Eschelon be billed?	Qwest continues to bill lines, features at Resale rates through existing resale

	billing process.
How will Eschelon be credited?	Qwest Finance compares end-of-month billed revenues for 1FB and centrex lines and features to quoted rate by state and issues Eschelon a check for the difference on a monthly basis. [454]

306. In addition to Qwest's expressly identifying the UNE-Star implementation as using the resale processes, the January 11, 2001 email identified areas of concern. These areas included problems with delivering switched access information, auditing minutes of use (MOU), and identifying USOCs to actually bill the "new product platform." All of these items demonstrate that the data derived from the UNE-Star product cannot be properly used to assess the adequacy of UNE-P billing under the ROC PIDs.

307. Despite the acknowledged resale nature of UNE-Star, Qwest has **selectively** used the data from UNE-Star to assert that Qwest is meeting the PIDs applied to UNE-P. Some UNE-STAR was included in the KPMG OSS test, under Resale Test Scenarios in the KPMG Final Report.[455] UNE-STAR was treated as a UNE-P product in Qwest's current PID reporting.[456] The extent of the use of UNE-Star data as a substitute for UNE-P data is reflected in the Appendix attached to this report.[457] Qwest relies on the agreement of the parties to the ROC as justifying the inclusion of UNE-Star data in the UNE-P PIDs.[458] There is little difference between the nature of resale (and UNE-Star) and UNE-P in the areas of maintenance and provisioning. [459] The same is not true in billing.

308. Qwest is dismissive of the other parties' objections to the inclusion of UNE-Star information in the PID categories of UNE-P. Qwest maintains that the differences between the billing processes are readily apparent and that "This issue does not indicate systemic problems with Qwest's OSS; rather, it is typical of business-to-business relationships, which should alone render the issue moot."[460] As a Qwest witness stated:

> [Eschelon] and [McLeod] maintain that the billing mechanism that Qwest uses to bill UNE-Star – billing resale rates initially, then truing up these bills on a monthly basis to UNE-Star rates – represents "inaccurate" or "incorrect" billing. When developing the UNE-Star platform, however, Eschelon and McLeod each understood and acknowledged that this was the billing solution Qwest would use to bill this newly-created, customized UNE platform.[461]

309. Qwest confuses the contract terms between itself and the two CLECs with the PID standards under which the data was reported. Mere agreement between a

BOC and CLEC that a certain process is acceptable does not determine that the data generated through that process will meet a PID standard. Any other conclusion would result in utterly worthless findings through the ROC testing process since "passing" would constitute whatever any two parties to an interconnection agreement said that it would mean. A BOC could simply "buy" compliance by paying a CLEC a premium for agreeing that a particular process complies with a PID. Such a practice would do nothing to show that Qwest has processes in place to submit accurate billing for UNE-P ordered by CLECs (which is what BI-3 is supposed to be measuring).

310. The arrangements between Eschelon and McLeod are not the sort of normal business-to-business relationships that lack an impact on this proceeding. These arrangements allowed Qwest to evade its obligation to make UNE-P available to the two largest CLECs in Minnesota. The contents of these arrangements were hidden from other CLECs and the Commission. Further, by using a billing process that made no effort to actually bill using UNE-P standards, full disclosure to the ROC TAG was needed **before** any UNE-Star data could be included in any UNE-P PID. While Eschelon and McLeod may have agreed to the billing "system" for UNE-Star, the ROC TAG did not agree that the particulars of this system met the BI-3A standards. The absence of this required disclosure subverted the agreed-upon ROC process. Without the disclosure needed to obtain the consent of the participants, Qwest cannot rely upon the ROC process to insulate itself from the valid criticisms of the parties to this docket.[462]

311. The approach taken by the FCC to assess the impact of the unfiled agreements over UNE-Star is, at best, inconsistent. For example, the FCC noted that Qwest continued to consider the unfiled agreements as not constituting interconnection agreements that must be filed with state commissions.[463] In a footnote, the FCC acknowledged that the Minnesota Commission had already found that these agreements were, in fact, interconnection agreements that must be filed.[464] Similar conclusions were reached in all the states in which Qwest had applied for Section 271 approval.[465] In the main, the FCC relied upon the absence of a factual record to support its refusal to inquire into Qwest's conduct as that conduct affects a demonstration that Qwest meets the requirements of Section 271.[466] A number of the state commissions in that proceeding had declined to consider the impact of the unfiled agreements due to the lack of a factual record on the impact of Qwest's conduct on its showing of compliance with the Section 271 standards.[467]

312. By contrast, the factual record in this docket establishes the serious adverse impact of UNE-Star reporting on the reliability of the data used to demonstrate compliance with the performance standards for billing. Similarly, the terms of these unfiled agreements demonstrate discrimination in the services and pricing by Qwest, in favor of two CLECs. The favorable terms were accompanied by an express obligation on the part of those two CLECs to not participate in Qwest's 271 proceeding in Minnesota. The reason for that provision is clear, since the two largest CLECs in Minnesota had found that they could not obtain UNE-P interconnection in commercial volumes at an acceptable level of quality. Only through the diligence of the Department was this situation brought to light.

313. The issue decided in the Unfiled Agreements docket is only whether the contracts at issue were interconnection agreements that must be filed with the Commission. The impact of the underlying terms of those agreements, including the assessment of UNE-Star on Qwest's performance demonstration, was left to this docket. As described in the foregoing Findings, the UNE-Star arrangement offered by Qwest results in data that cannot be used to support a finding of adequate performance in billing for UNE-P. Qwest has failed to show the necessary accuracy in billing that would allow CLECs to meaningfully compete using UNE-P in Minnesota.

Daily Usage Files

314. Another billing problem experienced by Eschelon (and identified by Qwest in the January 11, 2001 email) is the inaccuracy of the access usage records that Qwest has provided for its UNE-Star lines. After Eschelon began purchasing UNE-Star lines on November 15, 2000, Eschelon repeatedly complained to Qwest that Qwest was not providing Eschelon with complete and accurate switched access records for those lines, *i.e.*, that minutes for certain kinds of access usage were missing from the reports.[468] One type of call that was apparently missing from the records is intra-LATA toll calling to the UNE Star line that is originated by a Qwest end user who has Qwest as the presubscribed intra-LATA toll carrier.[469]

315. On July 3, 2001, Qwest described several responses to Eschelon's complaint about "missing minutes" that Qwest was undertaking. Those responses included making interim payments to Eschelon that were intended to compensate Eschelon for the lost switched access revenue attributable to the missing access minutes, and instituting a joint analysis and audit.[470] As found in the Unfiled Agreements Docket:

> 157. The fifth paragraph of Eschelon Agreement V contains a provision by which Qwest agrees to pay Eschelon $2 per month per line for Qwest intraLATA toll traffic that terminates to customers served by Eschelon's switch. The payment is a proxy for the amount Eschelon could actually bill Qwest for the termination of intraLATA toll traffic terminating on Eschelon's switch because Qwest either does not, will not, or cannot track such traffic.
>
> 158. The reason for the $2 payment is Qwest's failure to provide Eschelon with reliable information that would identify the intraLATA toll calls that terminate on the Eschelon switch. Qwest is the sole source of this information, because only it knows where the calls it passes on for termination on the Eschelon switch actually originate.
>
> 159. **The $2 payment is in lieu of Qwest providing Eschelon with accurate usage information related to the interconnection of the Eschelon and Qwest networks.** Accordingly, the $2 payment is a term of interconnection between Qwest and Eschelon that modifies their interconnection agreement.[471]

316. Despite those apparent agreements, not all related issues were resolved, and Eschelon requested that Qwest escalate its response to this issue in a December 7, 2001 letter.[472] It is clear that Eschelon had significant concerns about missing switched access minutes on its UNE-Star lines for many months, and that Qwest was aware of those problems. Despite this knowledge, Qwest reported this data as complying with the UNE-P billing PIDs and asserting that the data reflected accurate billing.

317. Qwest indicated that the manual process was replaced by mechanized DUF transmission on UNE-Star lines by approximately March 2001, adopting at that point a DUF process exactly the same as the process used for UNE-P.[473] But KPMG's first testing of Qwest's DUF capability in June, 2001, found that only 69% of the expected DUF records were received, meaning that nearly one-third (31%) of those records were missing or unaccounted for.[474] The performance level for this function is benchmarked at 95%.[475] Retesting by KPMG in late October, 2001, after Qwest had made system changes to correct identified problems, resulted in passage of only 70% of the DUF records expected.[476] Qwest had expressed its belief that the system changes had fixed the problems between the first and second test. Qwest attributed about half of the missing DUF records for the Eastern Region (which includes Minnesota) that occurred during the second test in October to a "pending order file process problem."[477] That problem was supposed to have been fixed by the new pending order file (POF) system installed several weeks before the second test.[478]

318. Qwest's DUF system passed KPMG's third test in January, 2002.[479] No KPMG retesting has occurred since that time. Qwest has no test information to suggest that the current completion percentage would meet or exceed the percentage in the third test or not.[480] Further, there is no evidence that the data in the KPMG January 2002 test recognized the problems with Eschelon's switched access records.

319. On February 8, 2002, Eschelon escalated its complaint with Qwest's billing inaccuracies under UNE-E to then Chairman and Chief Executive Officer Joseph P. Nacchio.[481] Eschelon's complaint described "100% of our UNE-E bills are inaccurate and will be inaccurate until Qwest completes the process necessary to provide UNE-E, rather than resale bills ...."[482] Eschelon identified missing minutes of use as a continuing problem, stating:

> Additionally, Qwest has not performed satisfactorily with respect to generating and reporting switched access minutes of use ("MOU"). Qwest has been shorting Eschelon switched access minutes and Qwest/Arthur Anderson, your auditor, has recognized that.
>
> * * *
>
> The Parties also agreed that the access payments issue would be resolved by joint audit. The joint audit was to continue until the auditor came to agreement, within plus or minus five percent, of the actual

number of access minutes. Qwest unilaterally terminated the work of its auditors before the audit concluded.[483]

320. With the manipulation of the UNE-Star billing adjustments, this PID is ineffective at demonstrating that Qwest is providing accurate bills to CLECs for UNE-P.[484] In addition, the PID measures only total dollar adjustments. No measurement is provided regarding what percentage of CLEC billing is in error. Only Qwest's adjustments to the billing are included in the PID to determine compliance. Failing to account for the amount in dispute affords the opportunity for manipulation of the error rate. The PID does not account for these adjustments in the month when the CLEC was billed. Thus, many months of errors can be hidden by making one adjustment in a single month. Similarly, the PID can be manipulated by Qwest's choice of which CLEC bill to adjust in any particular month.

321. Qwest cites its performance over the last four months as supporting its position. In each of the last three months for which results were available at the hearing, the difference, as shown by the BI-3 results, for CLECs and Qwest Retail was less than 1%. Qwest asserts that its billing accuracy for CLECs was above 98.8%. In July, the measured CLEC result was 98.86%, while Retail results were 99.59%. In June, the measured CLEC result was 99.35%, while Retail results were 99.53%. In April, the CLEC result was 98.88%, while Retail results were 99.57%.[485]. Qwest maintains that the volumes are so enormous that this is an inconsequential difference showing up as statistical disparity.[486] But Qwest's witness acknowledged that, according to Qwest's own test of statistical significance, Qwest has failed BI-3A in three of the last four months in evidence—April through July—and seven out of the last nine months in evidence.[487] The last reported month showed the billing inaccuracies would result in approximately $100,000 in billing errors.[488]

322. The failing performance percentage identified by Qwest comes before any of the other shortcomings of the data underlying these PID results are analyzed. This failing percentage is arrived at using the one-tailed test, which is inherently biased toward Qwest. The statistical performance claimed by Qwest does not accurately capture all of the billing accuracy problems that competitors experience in true commercial situations.[489]

323. In the *Qwest Nine State Application*, the FCC described some of the errors as “one time rate errors that are not likely to reoccur."[490] There are no such *de minimis* errors in this record.

324. Qwest has consistently missed BI-3A by its own data and using a test inherently biased toward Qwest passing the performance measure. Accounting for data improperly identified as passing for the two largest CLECs in Minnesota (UNE-Star billing) and for erroneous switched access reporting demonstrates that these failures are much more serious than is shown in the PID results. Qwest has not shown by a preponderance of the evidence that its billing accuracy in Minnesota is sufficient to support a finding of compliance with checklist item 2.

Direct Measure of Quality Payments.

325. The Department cites Qwest's payment of penalties under its interconnection agreement with McLeod as a further demonstration that Qwest is not meeting performance standards under a number of PIDs.[491] These penalty payments are for violations of direct measures of quality ("DMOQs") in service provided by Qwest occurring between January 1999 and March 2002.[492] More recently, the payments have been based on the results for PID measures OP-3, OP-5, MR-3, MR-7 and MR-9.[493] The Department asserts that Qwest's payment of these penalties demonstrates that in 2002 its systems could not meet the lesser standards in existence in 1996.

326. Qwest responded that the DMOQs were developed outside the ROC process. Qwest offered no testimony that would support a finding that the DMOQs were not the same measures that are used in the PIDs.[494] The Department calculated the payments that would be due to several Minnesota competitors under the terms of their interconnection agreements if Qwest applied the same approach for all competitors that it currently uses for McLeod, the single competitor that received monthly DMOQ payments.[495] Had Qwest applied a consistent approach for all competitors, it would owe many more Minnesota competitors substantial DMOQ service quality penalties, amounting to more than $100,000 per month.[496]

327. The DMOQ process is akin to the ROC testing protocol, with actual CLECs in Minnesota, serving actual customers, taking the place of the pseudo-CLEC emulating interconnection with Qwest. The FCC has noted the appropriateness of using "specific performance standards adopted by a state commission in an arbitration decision" as "persuasive evidence of commercial reasonableness."[497] The DMOQs are appropriate for use as evidence of Qwest's ability to comply with Minnesota-specific performance standards. The record on DMOQ penalty payments generally supports the assertions of CLECs and the Department that Qwest's actual performance in Minnesota is not as good as the multi-state performance measured through the ROC testing process.

Change Management Process.

328. As part of the OSS showing that must be made, the FCC has identified the need for an RBOC to have an adequate change management process (CMP). The FCC has outlined five criteria against which an RBOC's CMP is assessed to determine that the process is adequate to afford an efficient competitor a meaningful opportunity to compete. Those elements are:

> (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors

production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway. [498]

329. The FCC has also identified assisting CLECS in the use of available OSS functions and the RBOC demonstrating a pattern of compliance with the CMP as factors in assessing the adequacy of the CMP for Section 271 approval.[499]

330. Qwest asserts that its CMP is adequate to meet the FCC's requirements. AT&T disputes this assertion, pointing out that the existing CMP procedure has been submitted for change (using the existing CMP). The particular areas that are insufficient, in AT&T's estimation, are Qwest's demonstration of a pattern of compliance for the newly redesigned CMP and failure to resolve outstanding observations and exceptions from the third-party auditor, KPMG.[500]

331. KPMG's audit finding that the redesigned CMP was in compliance with the applicable standards came with exceptions. Exception 3094 was opened on December 12, 2001 and stated that Qwest did not adhere to its established change management process for notifying CLECs about a proposed change. It allowed input from all interested parties. On May 21, 2002, KPMG recommended that this exception be closed unresolved and stated:

> KPMG Consulting confirmed that Qwest initiated seven changes between April 1, 2002, and April 26, 2002. KPMG Consulting reviewed the relevant Qwest notifications and found that five of the changes were initiated after April 16, 2002, the date on which Qwest and CLECs reached agreement about the revised process. These five notifications include four Level 1 changes and one Level 2 change. Since the draft CMP document specifies that Level 1 changes are effective immediately upon notice to CLECs, there was no change implementation interval associated with this type of notification. KPMG Consulting verified that the one Level 2 change followed the 21-day advance notification interval. Due to the relatively few notifications issued since April 16, 2002 under the new process, KPMG Consulting was unable to make a conclusive determination that Qwest adheres to the process for Qwest-initiated Product/Process changes.
>
> Qwest and CLECs will continue discussions about the process for postponing a Product/Process change on May 21, 2002. This component of the Product/Process CMP is relevant to this Exception, which concerns the "notice-and-go" nature of the Product/Process CMP and lack of CLEC input for Product/Process changes. Based on this unresolved component, it appears that Qwest and CLECs have not developed all pertinent components of the Product/Process CMP.[501]

332. Qwest notes that the redesign portion of the CMP alteration is completed. Qwest indicated that the U.S. Department of Justice also has found that the CMP satisfies the applicable requirements.[502]

333. In the *Qwest Nine State Order*, the FCC found that Qwest's CMP was adequate, stating:

> As part of the change management process, competitive LECs and Qwest meet at least two days a month to consider changes to the CMP. In addition to providing a forum for upcoming releases, competitive carriers may both discuss change requests and prioritize requests at these meetings. Competitive LECs are able to initiate a change request by e-mailing a completed change request form (which is available on the CMP website with detailed instructions) to Qwest's Systems CMP Manager. Qwest's CMP Manager acknowledges receipt within two business days and within two more business days is responsible for posting the request to the CMP website and returning to the request originator a detailed report designating various Qwest subject matter experts, responsible directors, and the assigned request project manager. Within eight business days of receipt of the completed change requests, Qwest holds a clarification meeting with the request originator. If the request is received within three weeks of a scheduled CMP meeting, the request is presented at the meeting. Subsequently, depending on the OSS function affected by the change request, parties are invited to submit written comments and Qwest renders a decision pursuant to various defined schedules. We find that by providing this defined schedule of intervals and responsible personnel, Qwest demonstrates that it provides competitive LECs with an adequate opportunity to provide substantial input in the change management process.[503]

334. AT&T maintained that the other exceptions found by KPMG demonstrate that Qwest fails to adhere to its CMP process and that the process is inadequate for approval. Of particular concern to AT&T is the stand-alone test environment (SATE)(discussed below) and the manner in which changes to the SATE portion of the CMP were not conducted in accordance with the newly-developed CMP.

335. Qwest responded that:

> The few "not able to determine" results in the test were the result of the fact that the Redesign Process had not completed at the time the *Final Report* was issued. For example, KPMG stated that it was not able to observe the entire prioritization process for a major software release end-to-end or to observe the process after the definition of "Regulatory Change" was resolved.[504] KPMG has been able to observe the prioritization process for IMA release 10.0, IMA release 11.0, and SATE. However, at the time, an issue remained at impasse between CLECs and Qwest regarding whether changes necessary to meet PID benchmarks were to be considered regulatory mandates. Since that time, that issue has been resolved. Other than the effect of the resolution of that one issue, KPMG observed Qwest's adherence to each phase of the prioritization and packaging processes for major system releases.[505]

336. The requirement of a change management process is recognition that nothing in the telecommunications industry stands still for long. Every aspect of interconnection, including the CMP itself, is capable of improvement. Precluding approval of a Section 271 application because the RBOC is improving the change management system is a "Catch-22" that the FCC has refused to apply. The earlier version of the CMP was too difficult to use and the newer version reduces that difficulty. Qwest has shown that its CMP is adequate under the standards established by the FCC.

Stand Alone Test Environment.

337. As discussed above, the existence of a stable testing environment that mirrors production is a criterion for finding the CMP to be adequate. Qwest primarily relies upon its stand alone test environment (SATE) to meet this standard. AT&T argues that Qwest's most recent iteration of the SATE (version 11.0) has not been subject to retest by KPMG.[506] In the absence of a retest, AT&T maintains that Qwest has not shown the SATE criterion for CMP is met.[507]

338. AT&T also objects to Qwest's reliance on an older system, the Virtual Interconnect Center Knowledge Initiator ("VICKI") to demonstrate compliance with the stable testing environment requirement. The problems with VICKI, AT&T asserts, were the reason for Qwest development of the SATE.[508] These problems are described in KPMG's Exception 3029 which finds that Qwest's Interconnect Mediated Access ("IMA") and Electronic Data Interchange ("EDI") "Interoperability Testing environment [Interop] *does not offer* Co-Providers with sufficient testing capabilities."[509] KPMG noted further that "the interoperability test environment does not provide the testing capabilities for a CLEC to sufficiently test the IMA EDI interface prior to connecting to Qwest's production systems … ,"[510] and it went on to list the various limitations associated with interoperability testing. Qwest no longer supports Interop, but revised the guidelines for using these tools.[511] On that basis, KPMG closed the exception.

339. The FCC held that the mirroring requirement does not impose an absolute standard on the testing envirionment, stating:

> To the contrary, in the *SWBT Texas 271 Orde*r, the Commission held its mirroring requirement does not mandate that the testing environment provide a set of responses identical to the production environment. Instead, a BOC's testing environment must perform the same key functions. Here, SATE returns all IMA-EDI generated production error messages, as well as "commonly triggered" legacy system errors. Qwest acknowledges that SATE does not provide identical responses to every possible scenario. That is, SATE does not provide every possible error response in Qwest's legacy system, but rather provides a response that indicates the type of error submitted. Competitive LECs are then able to use Qwest's documentation to determine the cause of the error response. In order for competitive LECs to determine what a particular response represents, Qwest documents and makes available all known differences

between SATE and the production environment. In addition, Qwest has offered to add to SATE any error message or test scenario that a competitive LEC requests. Accordingly, we conclude that SATE is designed to ensure that competitive LECs' EDI interfaces can communicate with Qwest's systems regarding key functionalities and to allow real-world orders to be tested.[512]

340. The FCC also addressed the issue of versioning, holding that Qwest's practice of allowing the use of an earlier version of the SATE for CLECs which have not yet upgraded their systems was "a sufficient mechanism to protect competing carriers from premature cut-overs and disruptive changes to their OSS interfaces."[513]

341. Qwest has demonstrated that its SATE and VICKI systems meet the stable testing environment criterion for CMP. Qwest has shown by a preponderance of the evidence that it meets the CMP requirements for Section 271 approval.

Win-back.

342. The term "win-back" is used in the telecommunications industry to describe efforts to persuade customers who have switched their local telecommunications service to a competitor to return to the original provider of that service.[514] Generally, win-back campaigns offer some tariffed incentive to customers to return to their former carrier, such as service credits for a period of time.

343. AT&T asserts that Qwest's retail marketing and third party telemarketing groups have access to information taken from CLEC Local Service Requests ("LSRs") in violation of the SGAT, ICAs, 47 U.S.C. § 222 and ultimately 47 U.S.C. § 271. AT&T maintains that Qwest is offering win-back incentives that have not been approved by the Commission and that exceed Qwest's tariffed win-back offerings. These practices, if proven, could constitute violations of the standards for demonstrating that a market is open for competition and would support consideration of denial of Qwest's Section 271 application.

344. AT&T identified one customer experience in Minnesota and anecdotal evidence regarding technician comments as supporting its claims regarding win-back.[515] AT&T described how CLEC pending disconnects, and perhaps other LSR information, is scattered throughout Qwest's OSS. For example, a pending disconnect of a customer is identified in Qwest's internal order number by use of a code. This code is associated with the individual customer account and available to Qwest personnel through the Billing and Order Support System (known as "BOSS notes"). AT&T has demonstrated that Qwest retail personnel have the ability to access BOSS notes. Qwest has not demonstrated that it can identify who may access such information at any given moment.

345. Qwest responded by questioning the credibility of the witnesses offered by AT&T in support of these allegations. AT&T was permitted to conduct significant discovery into Qwest's marketing practices in order to pursue this issue. The discovery

did not disclose any additional information that would support a finding that Qwest engaged in a win-back practices complained of as a matter of company policy. The evidence offered by AT&T is credible and supports a finding that individual employees have made *ad hoc* efforts intended to convince customers to remain with Qwest. There is no evidentiary support for a finding that such practices were ever a Qwest policy or that Qwest would condone such conduct.

346. The FCC has declined to address allegations of isolated improper win-back and retention marketing in the context of Section 271 proceedings.[516] The FCC has found that the appropriate fora for such allegations are proceedings before state commissions. The FCC specifically found that "in the absence of a formal complaint to us [alleging] that BellSouth has failed to comply with section 222(b), the win-back issue in this case has been appropriately handled at the state level, and that the actions undertaken by the state commissions and BellSouth should be sufficient to ensure it does not recur."[517]

347. There is no evidence, beyond the isolated instances described above, that Qwest has engaged in the deliberate use of win-back offerings to undermine competition in Minnesota. The FCC has clearly excluded isolated instances as outside of the Section 271 process. The evidence provided does not support denial of Qwest's Section 271 application due to improper winback efforts.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Public Utilities Commission and the Administrative Law Judge have jurisdiction over the subject matter of this hearing pursuant to Minn. Stat. §§14.57-.62 and 216A.05 and Minn. R. 1400.5100-.8300.

2. The Minnesota PUC gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and has the authority to take the action proposed.

3. As the party proposing that certain action be taken, Qwest must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.[518] According to the FCC, the BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[519] As the Party proposing the action in this proceeding, Qwest has the burden of establishing facts supporting its proposals by a preponderance of the evidence. Similarly, any other Party advocating an affirmative proposal has the burden of proving that proposal by a preponderance of the evidence.[520] A party asserting an affirmative defense shall have the burden of proving that defense by a preponderance of the evidence.[521]

4. Qwest has demonstrated by a preponderance of the evidence that it provides interconnection in accordance with 47 U.S.C. § 271(b)(2)(B)(i) except for the proposed terms for collocation forecasting (Finding 62).

5. Qwest has not demonstrated by a preponderance of the evidence that it provides nondiscriminatory access to network elements in accordance with 47 U.S.C. § 271(b)(2)(B)(ii). The required showing cannot be made until Qwest has completed the conversion of UNE-Star facilities to UNE-P and demonstrated that its billing system is capable of meeting the appropriate performance measures for wholesale billing and providing accurate DUF records to allow CLECs to appropriately charge for switched access (Findings 97-100, 313, and 324).

6. Qwest has demonstrated by a preponderance of the evidence that it provides local loop transmission that is unbundled from local switching or other services, from the central office to the customer's premises, in accordance with 47 U.S.C. § 271(b)(2)(B)(iv) except for: DS1 loop intervals (Finding 125), conditioning charges (Finding 137), performance of LSTs (Finding 154), access to MLT results in the manual process for loop pre-qualification (Finding 180), access to NIDs (Findings 183 and 187), and rejecting LSRs for shared loops due to pending orders (Findings 272-273).

7. Qwest has demonstrated by a preponderance of the evidence that it provides local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services in accordance with 47 U.S.C. § 271(b)(2)(B)(v).

8. Qwest has demonstrated by a preponderance of the evidence that it provides local switching unbundled from transport, local loop transmission, or other services in accordance with 47 U.S.C. § 271(b)(2)(B)(vi).

9. Qwest has demonstrated by a preponderance of the evidence that it provides telecommunications number portability in accordance with 47 U.S.C. § 271(b)(2)(B)(xi).

10. Qwest has demonstrated by a preponderance of the evidence that it provides reciprocal compensation arrangements that comply with the requirements of section 252(d)(2) in accordance with 47 U.S.C. § 271(b)(2)(B)(xiii).

11. Qwest has not demonstrated by a preponderance of the evidence that it provides telecommunications services available for resale that comply with the requirements of sections 251(c)(4) and 252(d)(3) in accordance with 47 U.S.C. § 271(b)(2)(B)(xiv) due to the improper billing of TLAs (Finding 209) and the demonstrated discrimination in the offering of UNE-Star to two CLECs under terms and conditions concealed from other CLECs and the Commission (Findings 212 and 313). The required showing cannot be made until Qwest has completed whatever corrective actions are required by the Commission in the *Unfiled Agreements* docket and Qwest

either ceases billing for TLAs or amends its billing practices to provide notice to consumers that such billing may not be appropriate.

12. Any of the above Findings of Fact more properly considered Conclusions of Law are hereby adopted as such, and any Conclusions of Law more properly considered Findings of Fact are hereby adopted as such.

NOTICE

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minnesota Public Utilities Commission:

1. Adopt an Order incorporating the foregoing Findings and Conclusions;

2. Include in its Order in this proceeding a determination that Qwest has failed to meet the requirements set forth in 47 U.S.C. § 271; and

3. Include in its Order a recommendation that the FCC deny long distance authority to Qwest until Qwest corrects the conditions identified in Conclusions 4-6 and 11, above, and the Findings referenced therein.

Dated this 24th day of January, 2003.

_/s/ Richard C. Luis______________
RICHARD C. LUIS
Administrative Law Judge

Reported: Shaddix and Associates
Transcript prepared.

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

A crucial issue regarding Qwest's compliance with the OSS checklist items is whether Qwest can support the billing function for UNE-P in commercial volumes. Qwest's own evidence on this issue tends to show that Qwest cannot provide accurate billing for CLECs using UNE-P for interconnection.

As presented in this docket, Qwest attempts to use data generated through the resale process for UNE-Star lines as demonstrating compliance with the UNE-P billing standard. This effort is improper, since billing for UNE-P does not resemble resale billing and Qwest explicitly used the resale billing process for UNE-Star. Similarly, Qwest seeks to exclude from consideration its inability to provide DUF records to allow two CLECs to bill IXCs for access to UNE-Star lines.

Qwest cannot have it both ways. If UNE-Star is a resale product, the DUF problem does not apply, but Qwest has demonstrated that it cannot provide UNE-P in commercial volumes to the two largest CLECs in Minnesota. If UNE-Star is actually UNE-P (and Qwest has demonstrated that UNE-Star is not), then Qwest's inability to provide DUF files demonstrates that Qwest cannot provide accurate toll call records to allow the two largest CLECs in Minnesota to bill IXCs for switched access charges. Whichever road is taken, the destination remains the same. CLECs are prevented from exercising their full rights under existing FCC orders. Minnesota customers are denied the benefits of competition in local service. The lodestone of Section 271 approval is opening the local market to competition. Judged by that measure, Qwest's demonstration of compliance with the OSS-related checklist items falls short in the areas noted in the Findings of this Report and listed in the Conclusions. Until a demonstration of compliance in those areas is made, the ALJ concludes that it is appropriate for the Commission to recommend to the FCC that long distance authority be withheld.

R.C.L.

[1] 47 U.S.C.§§ 271(c)(2)(B), 271(d)(3)(A)(i).
[2] 47 U.S.C. § 271.
[3] *Id*. at § 271(d)(1).
[4] *Id*. at § 271(d)(3).
[5] *Id*. at § 271(d)(3)(A).
[6] *Id*. at § 271(c)(1).
[7] *Id.* at §§ 271(c)(2)(B), 271(d)(3)(A)(i).
[8] 47 U.S.C. § 272. *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).
[9] 47 U.S.C. § 271(d)(3)(C).
[10] *Id*. § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).
[11] 47 U.S.C. § 271(d)(2)(B).
[12] *Id.*
[13] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order*, CC Docket No. 97-137, FCC 97-298, 12 FCC Rcd 20543, ¶ 30 (rel. Aug. 19, 1997) ("*Ameritech Michigan Order*").
[14] *Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 18 (1998) (*BellSouth Louisiana II Order*).
[15] Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-322 (rel. December 23, 2002)("*Qwest Nine State Order*").
[16] 47 C.F.R. § 51.5; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15590, ¶ 176 (rel. Aug. 8, 1996)("*Local Competition Order*"); *In the Matter of the Joint Application by SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communication Servs., Inc. d/b/a Southwestern Bell Long Distance Pursuant to § 271 of the Telecomm. Act of 1996 to Provide In-Region, InterLATA Servs. in Arkansas and Missouri*, Memorandum Opinion and Order, App. C, ¶ 17 (No. 01-194, FCC 01-338) (rel. Nov. 16, 2001)("*Arkansas/Missouri 271 Order*").
[17] 47 U.S.C. § 251(c)(2).
[18] 47 C.F.R. § 51.305(a)(2).
[19] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3972, ¶ 66 (1999) (*Bell Atlantic New York 271 Order*), *aff'd*, *AT&T Corp. v. FCC,* 220 F.3d 607 (D.C. Cir. 2000).
[20] *Bell Atlantic New York 271 Order* at ¶ 224.
[21] *Bell Atlantic New York 271 Order* at ¶ 65.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, ¶¶ 490-91 (rel. Nov. 5, 1999)(*Third Report and Order*).
[23] *Id*.
[24] *Id*.
[25]Ex. 1 (Freeberg Direct re: Checklist Item 1), at 5; FTTH §7.1.2, Arizona Dial Tone §7.1.2.
[26] SGAT at §§ 7.1.2 & 7.1.2.1; Ex. 3 (Freeberg Rebuttal), at 14.
[27]AT&T Interconnection, Collocation, and Resale Brief, at 7 (citing 01/25/01 CO Tr. at p. 140).
[28]AT&T Interconnection, Collocation, and Resale Brief, at 7 (citing CO Exhibit 2 Qwest 70 at Attachment 3, p. 3 describing § 1.2, "Interconnection via Dedicated Transport Facilities").
[29] Ex. 3 (Freeberg Rebuttal), at 14.
[30] Ex. 1 (Freeberg Direct re: Item 1), at 6.
[31] *Id.* at 7.
[32] *Id.* at 8.
[33] *Id.* at 9.
[34] *Id.* at 10.
[35] *Id. at 11*.
[36] Of these, 810 trunks were for E911; 102,770 were local interconnection trunks; 688 were for operator service/directory assistance; and 15,270 were toll trunks. Ex. 1 (Freeberg Direct re: Item 1), at 11.
[37] *Id.*
[38] *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices,* Findings of Fact, Conclusions of Law and Recommended Decision, OAH Docket No. 12-2500-14490-2, PUC Docket No. P-421/C1-01-1375 (Aug. 2, 2002).
[39] SGAT at § 7.2.2.1.5.
[40] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996)("*Local Connection Order*"), ¶ 553
[41] AT&T Interconnection, Collocation, and Resale Brief, at 11 (*citing* Ex.. 64 (Wilson Affidavit), at 13-14; *see also,* Ex. 65 (Wilson Surreply Affidavit), Exhibit KLW-SURR-Interconnect-1.
[42] *Local Connection Order,* ¶ 553.
[43] Qwest Final Brief, I-7 (*citing*, *e.g.*, Before the New Mexico Public Regulation Commission, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269, Order Regarding *Report on Checklist Items 1, 11, 13 and 14* (Sept. 18, 2001), ¶¶ 41-43).
[44] *Qwest Nine State Order*, ¶ 316 (*citing* Developing a Unified Intercarrier Compensation Regime, FCC 01-132, *Notice of Proposed Rule Makin*g, 16 FCC Rcd 9610, 9652, para. 114 (2001)).
[45] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 553.(emphasis added).
[46] Qwest Final Brief, I-8 (*citing* Tr. 9/4/02 (Freeberg) at 62-63 and Ex. 3 (Freeberg Reply re: Checklist Items 1 and 13) at 23). Qwest noted that it has agreed to modify this section of the SGAT and any interconnection agreement, upon a CLEC's request, to reflect the Washington SGAT section 7.2.2.8.13 language.
[47] Qwest Final Brief, I-8.
[48] *Id*.
[49] Qwest Final Brief, I-8 (citing orders from New Mexico, Iowa, and Utah).
[50] *Qwest Nine State Order*, ¶ 321 (footnotes omitted).
[51] Ex. 3 (Freeberg Reply), at 24.
[52] AT&T Interconnection, Collocation, and Resale Brief, at 13-14.

[53] *Id.*

[54] Qwest Final Brief, I-9 (*citing* Ex. 3 (Freeberg Reply re: Checklist Items 1 and 13), at 40-41).

[55] Unless Qwest were to demonstrate that it is appropriate to charge CLECs twice for the same facility.

[56] Memorandum Opinion and Order, *In the Matter of Net2000 Communications, Inc. v. Verizon – Washington, D.C., Inc.,* File No. EB-00-018, FCC 01-381¶ 28, at 9-10 (rel. Jan. 9, 2002) (citations omitted)(emphasis added).

[57] *Id*.

[58] Qwest Final Brief, I-11 (citing Exhibit 3 Freeberg Reply re: Checklist Items 1 and 13 at 25).

[59] AT&T Interconnection, Collocation, and Resale Brief, at 20.

[60] Qwest Final Brief, I-11 (citing Ex. 64 (Wilson Reply re: Checklist Items 1 and 14), at 26-27).

[61] Qwest Final Brief, I-13 (citing Tr. 9/4/02 (Freeberg) at 74-76; Exhibit 3 (Freeberg Reply re: Checklist Items 1 and 13), at 4-5).

[62] Qwest Final Brief, I-13 (citing Exhibit 3 (Freeberg Reply re: Checklist Items 1 and 13), at 5, footnote 4; Ex. 45 (Burns Surreply), at 4-5).

[63] Qwest Final Brief, I-13 (citing Tr. 9/4/02 (Freeberg) at 82-84).

[64] Ex. 39 (Garvin Reply re: Checklist Item 1), at 6-9.

[65] Exhibit 3 (Freeberg Reply re: Checklist Items 1 and 13), at 26-30.

[66] Qwest Final Brief, I-13.

[67] Exhibit 3 (Freeberg Reply re: Checklist Items 1 and 13), at 32.

[68] Qwest Final Brief, I-17.

[69] Qwest Final Brief, I-18 (citing the Qwest website, http://www.qwest.com/wholesale/pcat/cascollo.html).

[70] Qwest Final Brief, I-17 (citing Tr. 9/5/02 (Bumgarner) at 130; Ex. 12 (Bumgarner Reply re Checklist Item 1), at 10).

[71] *Bell Atlantic New York 271 Order* at ¶ 66.

[72] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration & Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 & Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, CC Docket Nos. 98-147 & 96-98, FCC 00-297 (Released Aug. 10, 2000) ("*Order on Reconsideration*"), at ¶ 29.

[73] 47 C.F.R. § 51.323(l)(1).

[74] 47 C.F.R. § 51.323(l)(2).

[75] *See, Order on Reconsideration* at ¶ 30.

[76] *Id.* at ¶ 29.

[77] *Id*. at ¶ 32.

[78] AT&T Interconnection, Collocation, and Resale Brief, at 25.

[79] The SGAT sections containing the forecasting language are (1) §§ 8.4.2.4.3 and .4, (2) §§ 8.4.3.4.3 and .4, and (3) §§ 8.4.4.4.3 and .4.

[80] Qwest Final Brief, I-21 (citing Arizona, Idaho, Iowa North Dakota, Oregon, Washington and Wyoming as having "approved shorter collocation intervals conditioned upon CLECs provision of forecasts").

[81] Qwest Final Brief, I-21 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499 ("*Local Competition Order*"), ¶¶ 555-617 (rel. Aug. 8, 1996)(adopting 47 C.F.R. §§ 51.321, 51.323); *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, and 98-91, FCC 98-188, 13 FCC Rcd 24011 (rel. Aug. 7, 1998) ("*Advanced Services Order*"); *aff'd in part, rev'd in part sub nom., GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000); *Advanced Services Reconsideration Order*; *see also Collocation Waiver Order*

[82] *Order on Reconsideration* at ¶ 27.

[83] *Id*. at ¶ 28 (emphasis added).

[84] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Memorandum Opinion and Order, CC Docket No. 98-147, DA 00-2528 at ¶ 7 (Rel. Nov. 7, 2000) ("*Wireline Memorandum*")(emphasis added).

[85] *Wireline Memorandum,* ¶ 19.

[86] Tr. 12/5/02 (Bumgarner) Tr. at 68-78.

[87] *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Resolution of Volume IIA Impasse Issues, Docket No. 97I-198T (Aug. 17, 2001 at 66-72)**.**

[88] AT&T Interconnection, Collocation, and Resale Brief, at 35.

[89] *Order on Reconsideration* at ¶ 27 (emphasis added).

[90] Tr. 9/5/02 (Bumgarner), at 80-89.

[91] Wilson Affidavit at 31.

[92] *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices,* Findings of Fact, Conclusions of Law and Recommended Decision, OAH Docket No. 12-2500-14490-2, PUC Docket No. P-421/C1-01-1375 (Aug. 2, 2002).

[93] Qwest Final Brief, I-23.

[94] FTTH ICA at § 8.2.6.1.

[95] AT&T Interconnection, Collocation, and Resale Brief, at 41.

[96] Qwest Final Brief, I-23 (citing Bumgarner Reply re: Checklist Item 1 at 10; Tr. 9/5/02 (Bumgarner) at 125-135).

[97] 47 C.F.R. § 51.323(k)(3) states in pertinent part that, "[a]n incumbent LEC must make available . . . collocation in adjacent controlled environmental vaults, controlled environmental huts, or similar structures located at the incumbent LEC premises."

[98] Commerce First Brief, at 19 (citing Ex. 154 (Murray Reply), at ¶ 195).

[99] *In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport,* Second Report and Order, CC Docket No. 93-162, FCC 97-208 ("*Expanded Interconnection Order"*) at ¶117 (Rel. June 13, 1997).

[100] *Qwest Final Brief*, at 1-27.

[101] *Qwest Final Brief*, at I-27.

[102] 47 U.S.C. § 251(c)(3).

[103]*Id*.

[104]*See e.g.*, SGAT §§ 9.1.2 & 9.23.1.4-6; Ex. 66 (Wilson Reply re: Items 2, 5, and 6), at 4-10.

[105] *Local Competition Order* ¶ 443 (emphasis added).

[106] *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd. I*")

[107] *Id.,* 120 F.3d at 812.

[108] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, ("*UNE Remand Order*") ¶ 324 (Nov. 5, 1999) (emphasis added).

[109] *In re Investigation Into Compliance with Section 271*, WUTC Docket Nos. UT-003022 & UT-003040, Twenty-Eighth Supp. Order at 7 (March 2002).

[110] *Triennial UNE Review NPRM*, 16 FCC Rcd at 22811 (¶ 65).

[111] AT&T UNEs, Switching, and Transport Brief, at 5.

[112] Qwest Final Brief, 2-5; Ex. 80 (Stewart Reply re: Item 2), at 10-11.

[113] Ex. 66 (Wilson Reply re: Items 2, 5, and 6) at 7-8; Ex. 67 (Wilson Surreply re: Items 2, 5, and 6) at 4-7.

[114] Memorandum Opinion and Order, *In the Matter of Application of Verizon Pennsylvania Inc, Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd at 17469-70

(¶ 92,) CC Docket No. 01-138, FCC 01-269 at ¶ 92 (rel. September 19, 2001) ("*Verizon Pennsylvania 271 Order*").
[115] *See Verizon Pennsylvania 271 Order*, ¶ 91 (emphasis added).
[116] *Id*. at ¶ 92.
[117] *UNE Remand Order*, ¶ 162, fn. 292 (quoting the definition of dark fiber in Newton's Telecom Dictionary, 14th ed.).
[118] Stewart Reply re: checklist item 2 (Qwest Ex. 80) at 11.
[119] *See*, 47 CFR 51.315 ("Combination of unbundled network elements").
[120] ILECs are affirmatively prohibited from disrupting the existing retail service when converting that service to UNE-P. *See* 47 CFR 51.315(b) (affirmed in *AT&T Corp. et al. v. Iowa Utilities Board et al.*, No. 97-826 (S. Ct. January 25, 1999)).
[121] Ex. 127 (Simpson Direct re: Item 2), p. 6.
[122] Ex. 31 (Lundquist Reply), ¶ 28.
[123] *Id.*, at ¶ 38.
[124] Qwest Final Brief, 2-24.
[125] Ex. 43, WCD-23 (Powers Affidavit), ¶ 2.
[126] *Id.* at ¶ 3.
[127] *Id.* at ¶ 4.
[128] *Id.* at ¶ 5.
[129] Qwest refers to the same product as "UNE Eschelon" ("UNE-E") when provided to Eschelon and as "UNE-McLeod" ("UNE-M") when provided to McLeod. Ex. 43, WCD-23 (Powers Affidavit), at ¶ 8, fn. 9; Ex. 43, WCD-13 (Fisher Affidavit), at 4.
[130] Ex. 43, WCD-23 (Powers Affidavit), ¶ 6.
[131] *Id.*
[132] *Id.* at ¶¶ 6-7.
[133] *Id.* at ¶ 7.
[134] *Id.*
[135] For specifics, see Trade Secret Joint Ex. 417.
[136] *Id.*
[137] Ex. 43, WCD-23 (Powers Affidavit), ¶ 8.
[138] Ex. 31 (Lundquist Reply), ¶ 34.
[139] Tr. 9/17/02 vol. B, p. 37.
[140] Ex. 43, WCD-23 (Powers Affidavit), ¶¶ 8-9.
[141] Ex. 43, WCD-23 (Powers Affidavit), ¶ 15.
[142] Ex. 43, Attachment WCD-24 (June 3, 2002 Affidavit of Ellen Copley) (Copley Affidavit), ¶ 4; Ex. 43, Attachment WCD-14 (June 11, 2002 Affidavit of Lori Deutmeyer) (Deutmeyer Affidavit), at ¶ 11.
[143] Ex. 43, Attachment WCD-24 (Copley Affidavit), ¶¶ 4-6; Ex. 43, Attachment WCD-14 (Deutmeyer Affidavit), ¶ 15. The Commission-approved retail discount is 17.66%. *In the Matter of a Further Commission Investigation of Avoided Cost Discount of US West Communications (Now Qwest)*, MPUC Docket No. P-999/CI-99-776, Order, December 11, 2001.
[144] Ex. 43, Attachment WCD-24 (Copley Affidavit), ¶¶ 4-5; Attachment WCD-23 (Powers Affidavit), ¶ 7 and Powers Exhibit 2 (e-mail from Qwest's Account Manager Judy Rixe); Attachment WCD-14 (Deutmeyer Affidavit), ¶¶ 14-15.
[145] Ex. 43, WCD-14, (Deutmeyer Affidavit), ¶ 14.
[146] *Id*. ¶ 8.
[147] Ex. 43, WCD-24, (Copley Affidavit), ¶ 6.
[148] Id. ¶ 4.
[149] The reconciliation spreadsheet presents the UNE Star quantities in service for that month (by USOC), times the applied resale rate, and subtracts from that total those quantities times its actual chargeable UNE-P rates. The difference (pending acceptance by the CLEC) is the billing adjustment to

be refunded. *See*, Ex. 43, WCD-14, (Deutmeyer Affidavit), ¶ 15 and Deutmeyer Trade Secret Exhibit 4 (Qwest spreadsheet for September 2001).

[150] *See,* e.g., the credited amounts reported in Ex. 43, WCD-14 (Deutmeyer Affidavit), ¶¶ 18 (for Qwest's 14-state region) and 19 (Minnesota-specific).

[151] Ex. 43, WCD-14, (Deutmeyer Affidavit), (¶ 16).

[152] Ex. 153 (Zimmerman Direct), pp. 7-8.

[153] *Verizon Pennsylvania 271 Order*, ¶ 23.

[154] Ex. 153 (Zimmerman Direct), pp. 9-10.

[155] Ex. 153 (Zimmerman Direct), p. 9 (emphasis added).

[156] For specifics, see Trade Secret Joint Ex. 417.

[157] Ex. 43, WCD-23, pp. 2-4.

[158] *Application of BellSouth Corporation pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in region-inter LATA services in Louisiana,* CC Docket No. 98-121, FCC 98-271,released October 13, 1998, ¶ 54 ("*BellSouth Second Louisiana Order")*(emphasis added); *Ameritech Michigan Order,* ¶ 110*.*

[159] The contents of the Appendix are taken from Trade Secret Ex. 32 (Lundquist), at 27. *See also* Billing, *infra* (Findings 302, *et seq*.).

[160] *Ameritech Michigan Order,* ¶ 110.

[161] Ex. 43, WCD-24, ¶ 3. Approximately 655 lines have been identified as migrated to UNE-P from UNE-E as of that date. *Id*. at ¶ 2.

[162] *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation Regarding Unfiled Agreements*, Docket no. P-421/C-02-197 (ALJ Recommendation issued September 20, 2002) ("*Unfiled Agreements*").

[163] 47 U.S.C. § 271(c)(2)(B)(ii).

[164] Qwest Final Brief, 2-24 (citations omitted)(emphasis added).

[165] In the joint portion of this proceeding with the Unfiled Agreements Docket, Qwest strenuously denied offering any discounts. Tr. 8/16/02 (McKinney) 114-137. The Commission has found otherwise. *See Unfiled Agreements*, (Commission Order 12/18/02).

[166] Ex. 44 (Burns Reply), at 6.

[167] *See* Exhibit E to the FTTH (and Arizona Dial Tone) agreements for a list of available vertical switch features, as well as the USOC for each. *See* Simpson UNE-P Affidavit at 6 (citing Qwest's agreement with Arizona Dial Tone §§ 9.23.3.2-6).

[168] Qwest Final Brief, 2-24 (citing Ex. 45 (Burns Surreply), at 6; Tr. 9/09/02 (Burns) at 205-206 ("…Exhibit 1 is a weekly agenda –between my client and Qwest. It is a regularly scheduled meeting they have to try to resolve on-going issues.").

[169] Ex. 4 (Stewart Direct re: Checklist Item 2), at p.1.

[170] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (" *UNE Remand Order*") ¶ 313. *See also* Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (Rel. January 19, 2001) ("*Line Sharing Reconsideration Order*"), ¶ 56, citing 47 C.F.R. § 51.319(c)(3)(B).

[171] AT&T Emerging Services Brief, at 11 (citing AT&T Exhibit 70, *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission Of Texas Oversight Concerning Line Sharing Issues*, Arbitration Award, Docket 22168, *Petition Of Covad Communications Company And Rhythms Links, Inc. Against Southwestern Bell Telephone Company For Post-Interconnection Dispute Resolution And Arbitration Under The Telecommunications Act Of 1996 Regarding Rates, Terms, Conditions And Related Arrangements For Line Sharing***,** Arbitration Award Docket 22469,Public Utilities Commission of Texas (Rel. June 13, 2001) (the "*Texas Arbitration Award*").

[172] Exhibit 44 (Burns Reply), page 16, citing to FTTH and Arizona Dial Tone Agreements at paragraphs 9.7.2.12.
[173] First Report and Order and Further Notice of Proposed Rulemaking, *In the Matters of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-48 (March 31, 1999) ¶ 42.
[174] See, e.g. *Qwest Nine State Order*, ¶ 418.
[175] Ex. 4 (Stewart Direct) at 4-8.
[176] Qwest Final Brief, 2-13 (citingSection 9.1.2. of the FTTH Agreement and MN SGAT. *See also* § 9.23.3.2 regarding UNE Combinations).
[177] AT&T Emerging Service Brief.
[178] Ex. 6 (Hooks Affidavit), pp. 3, 7-12; Tr. 9/4/02 (Hooks), at 132-137.
[179] AT&T Emerging Service Brief, at 3.
[180] *Qwest Nine State Order*, ¶ 278
[181] *Local Competition First Report and Order*, 11 FCC Rcd at 15691 ¶ 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73 ¶¶ 166-67 fn. 301.
[182] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas,* Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, 15 FCC Rcd at 18481 ¶ 248 (Rel. June 30, 2000) ("*SWBT Texas 271 Order*"); *Bell Atlantic New York 271 Order*, 15 FCC Rcd at 4095 ¶ 269.
[183] *Id.*
[184]Merger Stipulation, p. 16.
[185]Tr. 9/06/02, p. 16.
[186]Ex. 68 (Wilson Loop Affidavit), p. 25.
[187] *In the Matter of Qwest Corporation's Section 271 Application*, Arizona Corporation Commission Docket No. T-00000A-97-0238, Final Report on Qwest's Compliance with Checklist Item No. 4, dated February 20, 2002, ¶ 164 (AT&T Record Designation, dated June 14, 2002). This is the final staff report in Arizona.
[188] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & 003040, 28th Supplemental Order, ¶ 124-25 (AT&T Record Designation, dated June 14, 2002).
[189] *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Order Regarding Facilitator's Report on Checklist Item 2, Checklist Item 4, Checklist Item 5 and Checklist Item 6, New Mexico Utility Case No. 3269, dated November 20, 2001, ¶ 72 (AT&T Record Designation, dated June 14, 2002).
[190]Ex. 68 (Wilson Loop Affidavit), p. 26.
[191] Ex. 19 (Pappas Loop Affidavit), p. 12; Ex. 10, Qwest Performance Results for MR-6, pp. 130-31.
[192] *BellSouth Louisiana II Order* ¶ 187; *SBC Texas 271 Order* ¶ 248.
[193] Ex. 69 (Wilson), KLW-SURR-LOOP-5 at 54-56; Ex. 44, at 19-20.
[194] Ex. 19, at 27.
[195] Ex. 19, at 27-28.
[196] Ex. 19, at 31.
[197] *In the Matter of a Generic Investigation of U S West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements,* Order Granting Reconsideration, Setting Prices and Ordering Compliance Filing, Docket No. P-442,5321,3167, 466,421/CI-96-1540 at 5-6 (Mar. 15, 2000).
[198] Tr. 10/9/02, at 77-78.
[199] 47 C.F.R. § 51.319(h)(1).
[200] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*, CC Docket No. 96-98, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912, 20924-27 ¶¶ 20-27 (*Line Sharing Order); Line Sharing Reconsideration Order* ¶ 10.
[201] *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access*, Docket No. P-999/CI-99-678, Order Adopting Terms and Conditions for Provision of Line Sharing in Minnesota and Initiating Cost Proceeding (Dec. 3, 1999).
[202] Ex. 5, KAS-ES-03.
[203] *Id.*, KAS-ES-04.

[204] *See generally SWBT Texas 271 Order*, 15 FCC Rcd at 18515-17 ¶¶ 323-29; 47 C.F.R. § 51.703(c).
[205] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348 ¶ 220.
[206] *Line Sharing Reconsideration Order* ¶ 18 ("Independent of the unbundling obligations associated with the high frequency portion of the loop that are described in the Line Sharing Order, incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop. This obligation extends to situations where a competing carrier seeks to provide combined voice and data services on the same loop, or where two competing carriers join to provide voice and data services through line splitting.").
[207] Ex. 10 at 183 (OP-4C).
[208] Ex. 10 at 180 (OP-4 Zones 1 and 2)
[209] Ex. 5 at 11-12.
[210] Tr. 9/6/02, at 99.
[211] Tr. 9/13/02, at 37.
[212] Tr. 9/6/02, at 95.
[213] *SWBT Texas 271 Order* ¶¶ 325-27.
[214] *See* Ex. 68, KLW-LOOP-11, *Order Approving Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315 (Mar. 14, 2001).
[215] *SWBT Texas 271 Order* ¶¶ 325-27.
[216] Ex. 5, KAS-ES-02 at 8.
[217] *Id.*
[218] Ex. 77 at 12-13.
[219] *UNE Remand Order*, ¶ 427.
[220] *Id.* ¶ 428.
[221] *Id.* ¶ 429.
[222] *Id.* ¶ ¶ 429, 431.
[223] Ex. 49, BJB-LOOPQUAL-9.
[224] Ex. 49.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] Ex. 49 at 12.
[229] *Id.* at 11-12.
[230] *Id.* at 48.
[231] The *Qwest Nine State Order* notes that since June 2002 Qwest has received only five manual look-up requests from one CLEC. *Id.* ¶ 70, fn. 251.
[232] *SBC Kansas/Oklahoma Order*,¶ 121; *UNE Remand Order* ¶ 430.
[233] Ex. 49, at 24-26.
[234] *Qwest Nine State Order*, ¶¶ 66-70.
[235] Ex. 49, at 48-50.
[236] Tr. 9/10/02, at 134-35. MLTs may overestimate loop length by as much as 20%. *Id.*
[237] *Qwest Nine State Order*, ¶ 74; Ex. 27
[238] Ex. 49, at 36.
[239] Ex. 182, at 6.
[240] Tr. 9/6/02, at 146.
[241] *Qwest Nine State Order*, ¶ 76.
[242] *See generally* Ex. 18, DP-LOOP-15; Ex. 19, at 18-24.
[243] Ex. 18, DP-LOOP-15; Ex. 186; Tr. 9/6/02, at 143.
[244] *See Qwest Nine State Order,* at ¶ 78, fn. 277.
[245] *UNE Remand Order* at ¶ 220, 232.
[246] Ex. 19 at 56-72.
[247] Ex. 19 at 56.
[248] This issue may have been resolved, because AT&T did not brief it.
[249] FTTH ICA § 9.3.1.7.
[250] Ex. 19 at 65.

[251] WA Twentieth Supplemental Order (AT&T's Record Designation dated June 14, 2002).
[252] 47 U.S.C. § 271(c)(2)(B)(v).
[253] *Bell Atlantic New York 271 Order*, at ¶ 337.
[254] As reflected in the FTTH, Arizona Dial Tone and SGAT, in §§ 9.6 and 9.8.
[255] Ex. 66 (Wilson Reply Checklists Items 2, 5, and 6), at 52-53.
[256] *Qwest Final Brief*, at I-25.
[257] 47 U.S.C. § 271(c)(2)(B)(v).
[258] *See* FTTH, Arizona Dial Tone and SGAT at §§ 9.9 and 9.12.
[259] *UNE Remand Orde*r, ¶¶ 253 & 278.
[260] *Id.* at ¶ 278.
[261] *UNE Remand Order*, at ¶ 409.
[262] Ex. 66 (Wilson Reply re: Checklist Items 2, 5 & 6), at 12–17; Ex. 40 (Price Affidavit re: Checklist Items 2, 4, 5 & 6), at 47-50.
[263] Ex. 66, at 13.
[264]47 U.S.C. § 271(c)(2)(B)(xi).
[265]47 U.S.C. § 153(30).
[266] Ex. 68 (Wilson Reply re: Checklist Items 4 and 11), at 47.
[267] Ex. 14 (Bumgarner Reply), at 12-13.
[268] 47 U.S.C. § 271(c)(2)(B)(xiii).
[269] *Id*.§ 252(d)(2)(A).
[270] *See* Ex. 64 (Wilson Reply re: Checklist Items 1 and 14), Sections A.3.a and b.
[271] *See In the Matter of U S West Communications, Inc.'s Proposal to Offer a Rate Stability Plan for Single Number Service*, Docket No. P-421/EM-95-1245, Order Rejecting Rate Stability Plan, May 7, 1996; *In the Matter of a Request by U S West Communications, Inc. for Authority to Introduce a Rate Stability Plan for the Service Configuration Element of ISDN Primary Rate Service*, Docket No. P-421/EM-96-1419, Order Approving Petition, March 20, 1997; *See*, *In the Matter of a Complaint by InfoTelCommunications, LLC v. US West Communications, Inc. Concerning Resale of Contract Services*, Docket No. P-421/C-98-10, Order Construing Tariffs and Prohibiting Termination Charges in Resale Context, 1998 Minn. PUC LEXIS 65, May 21, 1998, at *8; *In the Matter of U S West Communications, Inc.'s Proposed Revisions to Termination Liability Assessments*, Docket No. P-421/EM-98-769, Order Rejecting Tariff/Price Lies Revisions, Clarifying Practical Effect of Filing, and Staying Implementation of Future Tariff/Price List Revisions, October 13, 1998, at 7; *In the Matter of a Complaint by InfoTel Communications, LLC v US WEST Communications, Inc., Concerning Resale of Contract Services US WEST Communications, Inc., Relator, vs. Minnesota Public Utilities Commission, Respondent InfoTel Communications, LLC, Respondent*, Docket No. C4-98-1929, 592 N.W.2d 880 (Minn. App. 1999), *rev denied*, July 28, 1999; and *In the Matter of Qwest Corporation's Refiling of its Proposed Tariffs Regarding Termination Liability Assessments as Applied to Resale Arrangements*, Docket No. P-421/AM-00-1165, Order Rejecting Tariff/Price List Revision, October 2, 2001.
[272] *In the Matter of Qwest Corporation's Refiling of its Proposed Tariffs Regarding Termination Liability Assessments as Applied to Resale Arrangements*, Docket No. P-421/AM-00-1165, Order Rejecting Tariff/Price List Revision, October 2, 2001, p. 11 (*TLA Order*).
[273] *Id*. at 9.
[274] *Id*. at 11-12.
[275] *Id*. at 12-14.
[276] Tr. 10/08/02 (Simpson), at 23-24.
[277] *See* Tr.9/9/02, pp. 101-102.
[278] Tr. 10/08/02 (Simpson), at 34.
[279] Ex. 32 (Lundquist Affidavit), at 51-55, Attachments 10-12.
[280] See Ex. 178.
[281] Ex. 64 (Wilson Reply re: Checklist Items 1 and 14), at 41-44.
[282] Ex. 134, at 4.
[283] *Id*.
[284] *See Unfiled Agreements*, (Commission Order 12/18/02).
[285] *Bell South Louisiana Order* at ¶ 54.
[286] In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and

Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, 16 FCC Rcd. 8394 (Apr. 16, 2001) ("*Verizon Massachusetts Order")* at ¶ 13.
[287] In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, 16 FCC Rcd. 14147 ("*Verizon Connecticut Order")* at Appendix D-5, ¶ 8 (October 20, 2001).
[288] Ex. 108, at 6.
[289] Ex. 154, at ¶ 25.
[290] Ex. 146, *Bell Atlantic New York 271 Order*, Appx. B., paragraph 2 (re removing effects of random variation); Tr. 10/2/02 (Williams), at 42-43 (FCC has accepted this test in every Section 271 proceeding). For small sample size PIDs (typically less than 30), other methods such as permutation analysis or binomial analysis more accurately account for random (i.e., nondiscriminatory) factors in the data. *BellAtlantic New York 271 Order,* Appx. B, paragraph 13. Qwest used the permutation distribution. Tr. 10/2/02 (Williams), at 71-72.
[291] Ex. 146, *Bell Atlantic New York 271 Order*, Appx. B., paragraph 9. The 95% confidence, one-tail test that Qwest used results in a "modified z-score" that is compared to a "critical value," which indicates the threshold of statistical significance, taken from modified z-test statistical tables. Generally in Qwest's data, the sample size lies between 30 and 150, resulting in a critical value of 1.645; for a result to be statistically significant, its modified z score must be 1.645 or higher. For some PID data, the sample size is much larger, resulting in a critical value of as high as 4.3 for those results, *e.g.,* MR-8 data for business resale, Ex. 10 at 250.
[292] Ex. 154, at ¶ 11.
[293] *Id*. at ¶¶ 94-95 and Ex. 157 at ¶ 11; Ex. 141 at 6-8.
[294] *Id*. at ¶¶ 96-97; Ex. 157 at ¶ 40.
[295] *Id*. at ¶¶ 96-98; Ex. 157 at ¶ 49.
[296] *Id*., Attachment 2.17 (Liberty Consulting Group Data Reconciliation).
[297] Tr. 10/1/02, p. 95*.*
[298] Ex. 154, Attachment 2.17, at 20.
[299]*Id*. at ¶ 170.
[300]*Id*. at ¶ 169-170.
[301] *Id.* at ¶ 171-172.
[302] Bayesian statistical tests reflect both the sample data and "prior" expectations that the decision maker holds based on other contextual information so that the final decision incorporates all of this information. The FCC has explicitly indicated its openness to consider Bayesian statistical tests in future 271 applications. *Bell Atlantic New York 271 Order*, Appendix B, fn. 3.
[303] Ex. 157, at ¶¶ 35, 45 and 58; Ex. 158, at ¶ 14.
[304] Qwest Performance Brief, at 7 (citing *Verizon Massachusetts Order* at paragraph 13; *Bell Atlantic New York 271 Order*, Appdx. B. at ¶ 13 (accepting statistical methods negotiated by parties at state level)).
[305] Ex. 146, Bell Atlantic New York 271 Order, Appx. B., at ¶ 2 (removing effects of random variation); Tr. 10/2/02 (Williams), at 42-43 (FCC has accepted this test in every Section 271 proceeding). For small sample size PIDs (typically less than 30), other methods such as permutation analysis or binomial analysis more accurately account for random (i.e., nondiscriminatory) factors in the data. *Bell Atlantic New York 271 Order,* Appx. B, ¶ 13. Qwest used the permutation distribution. Tr. 10/2/02 (Williams), at 71-72.
[306] Ex. 146, *Bell Atlantic New York 271 Order*, Appx. B., ¶ 9. The 95% confidence, one-tail test that Qwest used results in a "modified z-score" that is compared to a "critical value," which indicates the threshold of statistical significance, taken from modified z-test statistical tables. Generally in Qwest's data, the sample size lies between 30 and 150, resulting in a critical value of 1.645; for a result to be statistically significant, its modified z score must be 1.645 or higher. For some PID data, the sample size is much larger, resulting in a critical value of as high as 4.3 for those results, *e.g.,* MR-8 data for business resale, Ex. 10 at 250.
[307] *Id.*
[308] *Verizon Connecticut Order* at Appendix D-5, ¶ 8.
[309] *Bell Atlantic New York 271 Order*, Appendix B, fn. 50.

[310] Tr. 10/2/02 (Williams) at 42-43.
[311] Qwest Performance Brief, at 8.
[312] Ex. 150 and Tr.10/2/02, p. 151.
[313] Tr. 10/2/02 (Williams), at 153-155.
[314] Tr. 10/3/02, p. 101.
[315] Ex. 147, *In the Matter of Qwest's Performance Assurance Plan*, Docket No. P-421/CI-01-1376, Order Adopting Plan and Setting Further Procedural Schedule (adopting terms identical to Colorado Performance Assurance Plan or CPAP), and Ex. 148, *Colorado Performance Assurance Plan*, Sections 4, 5. In adopting the Colorado PAP, the Commission has recognized that the critical value for sample sizes above 150 is higher than the 1.645 critical value used for most of Qwest's data, *e.g.*, for a sample size of 3001 and above the critical value is 4.3. Ex. 148, CPAP, Section 5.1 "Critical Z-Value;" see also, Tr. 10/2/02 (Williams) at 49-50. The CPAP adopted a CLEC proposal; this test was not proposed on Qwest's own initiative. Tr. 10/2/02 (Williams), at 48.
[316] Tr. 10/2/02, at 74.
[317] Qwest Performance Brief, 10 (citing Ex. 148, CPAP, Section 5.1).
[318] Since the null hypothesis is parity, it is possible for a performance measure to assessed as satisfied if enough of the results fall in the "unable to determine" category. Thus, "don't know" is the same as "pass."
[319] *Bell Atlantic New York 271 Order*, Appendix B, fn. 50.
[320] Ex. 154, at ¶ 25.
[321] Ex. 154, at ¶ 38. In any given month, there are a certain number of measures for which Qwest does not report results, either because there is no data or incomplete data to determine a pass/fail. Ex. 154, at fn. 21.
[322] *Id.* at ¶ 40.
[323]Ex. 157, at ¶¶ 47 and 57; Ex. 158 (Murray Supplemental Surreply), at fn. 10.
[324] Ex. 157, at ¶¶ 11 and 48.
[325] Ex. 158, at ¶¶ 5, 8, and 15-16, and Attachment TLM-12.
[326] *Id.*
[327] *Id.* at ¶¶ 15-16 and Attachment TLM-12.
[328] In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269 ("*Verizon Pennsylvania Order")* at Appendix C, ¶ 13; Tr. 10/3/02, at 104-105.
[329] *Bell Atlantic New York 271 Order*, at ¶ 59.
[330] *Verizon Connecticut Order* at Appendix D-5, ¶ 8.
[331]*Verizon Pennsylvania Order* at ¶ 90. Verizon consistently missed its performance objectives for high capacity loops.
[332] *Bell Atlantic New York 271 Order*, at ¶ 55 ("We caution, however, that adoption by a state of a particular performance standard pursuant to its state regulatory authority is not determinative of what is necessary to establish checklist compliance under section 271.").
[333] *Verizon Pennsylvania Order* ¶ 25 (rel. Sept. 19, 2001) ("").
[334] *See Local Competition First Report and Order*, 11 FCC Rcd at 15766 (¶ 523). *See also Georgia/Louisiana 271 Order* at App. D; *Arkansas/Missouri 271 Order*, 16 FCC Rcdat 20857-58 (App. D, ¶ 26); *Verizon Pennsylvania Order*, 116 FCC Rcdat 17520 (App. C, ¶ 26).
[335] 47 U.S.C. § 271(c)(2)(B)(ii).
[336] *See Georgia/Louisiana 271 Order* at App. D; *Arkansas/Missouri 271 Order*, 16 FCC Rcdat 20859 (App. D, ¶ 29); *Verizon Pennsylvania Order*, 16 FCC Rcdat 17521-22 (App. C, ¶ 29); *Bell Atlantic New York 271 Order*, 15 FCC Rcd at 3971 (¶ 44), *citing Ameritech Michigan Order*, 12 FCC Rcd at 20599.
[337] *See id.*
[338] *See Georgia/Louisiana 271 Order*, at App. D; *Arkansas/Missouri 271 Order*, 16 FCC Rcdat 20859-60 (App. D, ¶ 30); *Verizon Pennsylvania Order*, 16 FCC Rcdat 17522 (App. C, ¶ 30); *Bell Atlantic New York 271 Order*, 15 FCC Rcd at 3992-93 (¶ 88).
[339] *Id.*
[340] *See Georgia/Louisiana 271 Order* at App. D; *Arkansas/Missouri 271 Order*, 16 FCC Rcdat 20859-60 (App. D, ¶ 30); *Verizon Pennsylvania Order*, 16 FCC Rcdat 17522 (App. C, ¶ 30); *Bell Atlantic New York 271 Order*, 15 FCC Rcd at 3992-93 (¶ 88).
[341] *Bell Atlantic New York 271 Order*, at ¶ 53.

[342] *Ameritech Michigan Order,* ¶ 138; s*ee also, Verizon Pennsylvania Order*, Appendix C, ¶ 31.
[343] Ex. 182, p 25.
[344] *See id.*
[345] Ex. 182, p.25.
[346] *Id.* p. 26.
[347] Ex. 102 (Notarianni Reply), at 35-38 (additional information about the two Minnesota orders identified by Covad is contained in CLEC Specific Trade Secret Exhibit LN-OSS-72).
[348] Qwest OSS Brief, at 21.
[349] *Georgia/Louisiana 271 Order* at App. D; Arkansas*/Missouri 271 Order*, 16 FCC Rcd at 20863-64 (App. D, ¶ 36).
[350] Ex. 141, Attachment MGW-PERF-6, pp. 10-11.
[351] Tr. 9/17/02, p. 23.
[352] Tr.10/2/02, p. 218.
[353] Ex. 31 (Lundquist Affidavit), p. 10, quoting *Application of Verizon New England, Inc. Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance, NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions and Verizon Global Networks Inc.) for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, *Memorandum Order and Opinion*, Rel. April 16, 2001, at ¶ 77.
[354] *Verizon Pennsylvania Order*, at C-11, ¶ 12.
[355] AT&T Performance Brief, at 18 (citing Ex. 165, Exhibit JFF-UNE-P-6, p. 2).
[356] Ex. 165, Exhibit JFF-UNE-P-6, p. 3.
[357] Ex. 102, p. 47.
[358] Ex. 108, p. 14.
[359] Ex. 165, Exhibit JFF-UNE-P-6, pp. 4-5.
[360] *Id.* Exhibit JFF-UNE-P-6, p. 7.
[361] Ex.108, p. 146.
[362] *Id.* pp. 14-15.
[363] Supplemental orders are subsequent orders submitted for the purpose of making material changes to the original order such as a change in due date, cancellation or adding a vertical calling feature.
[364] Ex. 34, p. 4, and Att. 1, KPMG Exception Report 3116, Disposition Report, March 25, 2002, at 1.
[365] Ex, 34, p. 5 and Att. 2, p. 6.
[366] *Id.* Tr. 9/9/02, pp. 74-5.
[367] Tr. 9/9/02, pp. 74-5; Ex. 34, p. 6 and Att. 4.
[368] *Id.*
[369] *Id*.
[370] Ex. 37 (*Verizon Massachusetts Order* excerpt); Tr. 9/9/02, pp. 82-84.
[371] Ex. 37, at ¶ 78 (emphasis in original).
[372] Ex. 37, at ¶ 78.
[373] *Qwest Nine State Order*, at ¶ 87.
[374] *Id*. at fns. 315-316.
[375] *See* Ex. 102, Attachment LN-OSS-77, *Qwest Manual Order Entry Performance Indicator Description Adequacy Study,* KPMG Consulting, April 30, 2002, (Adequacy Study) p. 1.
[376] *Id.*
[377] *Id.*
[378] *Id*.
[379] *Id.*
[380] *Id*.
[381] *See* Ex. 102, Attachment LN-OSS-77, (Adequacy Study).
[382] *Id*. p. 1.
[383] *Id*.
[384] *Id.* at 2 and Tr.9/16/02, p. 163.
[385] Ex. 102, Attachment LN-OSS-77, (Adequacy Study), pp. 2-6.
[386] Ex. 165 (Finnegan re: Minnesota UNE-P Test, 2nd errata), p. 11.
[387] Qwest OSS Brief, p. 14.
[388] *Qwest Nine State Order*, at ¶ 99.
[389] Ex. 180, at 29, 34-35.

[390] Qwest has also maintained, incorrectly, that an order for DSL can be placed before Qwest DSL is disconnected. Ex. 77, p. 34.
[391] Ex. 102 (Notarianni Reply), Attachment LN-OSS-73. The Department found examples by examining the "remarks" in Qwest's January 2002 CRM_ *ad hoc* database underlying Qwest's PO PIDs. *See* Ex. 158 (Murray Supplemental Surreply), at ¶ 56 and fn. 42.
[392] Ex. 155, at ¶ 208.
[393] Ex. 141 (Williams Reply), Exhibit MGW-PERF-6, p. 34.
[394] Tr. 10/1/02, p. 41.
[395] *Id*.
[396] Tr. 10/1/02, p. 42 – 43.
[397] Tr. 9/17/02, pp. 58 – 59.
[398] Tr. 9/17/02, pp. 52 – 55.
[399] Tr. 9/17/02, p. 56.
[400] Ex. 139, Summary of Notes on the Qwest Regional Performance Results Report, September 2001 through August 2002, dated September 24, 2002, General Comments.
[401] Ex. 139, Attachment 3, Qwest Draft Description of Service Order Accuracy.
[402] Tr. 10/2/02, at 177.
[403] *Qwest Nine State Order*, ¶ 105, fn. 390.
[404] *Qwest Nine State Order*, ¶¶ 103-104.
[405] *Id*.
[406] Due dates are known as Firm Order Commitment ("FOC") dates.
[407] *See* Ex. 124, Confidential Exhibit KMD-1.
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.*
[412] In this proceeding,Qwest argued that in some cases its poor performance under the PO-15 metric reflects its (unilaterally) moving the FOC date to an earlier date, thereby providing superior service than committed to in the previous FOC. Covad submits that, even assuming arguendo that this is the case for some of Qwest's FOC changes, the customer disruption involved in moving up a FOC date for orders requiring a Qwest technician to perform work at the customer premises (e.g., stand alone loops) is hardly "superior" service. In such instances, Qwest's unilateral change of the delivery date requires a corresponding change in availability for the end user as well. The frequent FOC changes reflected in Qwest's performance results thus impact Covad's reputation and customer relationships regardless of which way the changed FOC date moves.
[413] Ex. 180 (Camarota), p. 26. This is particularly true for DSL, due to the lack of other CLECs in this product area.
[414] Ex. 180 (Camarota), p. 25.
[415] *Qwest Nine State Order*, ¶ 96.
[416] Ex. 122 (Doberneck), p. 14-15; Ex. 124, p. 8; Tr. 9/17/02 (Stright) p. 117-118.
[417] Ex. 180 (Camarota), p. 28-29.
[418] Covad OSS and Performance Brief, at 40-42 (citing Ex. 122 (Doberneck), p. 14-15; Ex. 124 (Doberneck Surreply), p.8).
[419] Covad Brief, p. 43.
[420] *See* Trs. 9/12/02 (Stewart), at pp. 207-250 and 9/13/02 (Stewart), at pp. 6-45, 101-122, 134-142.
[421] *Qwest Nine State Order*, ¶ 97.
[422] Ex. 17, pp. 21 – 22.
[423] Tr. 10/1/02, pp. 18 – 23.
[424] Tr. 10/1/02, pp. 22 – 23.
[425] Tr. 9/17/02, p. 63 – 64.
[426] Ex. 168, p. 9.
[427] Tr. 9/17/02 (Stright), pp. 88-90.
[428] Tr. 10/2/02 (Williams) pp. 92-93.
[429] Tr. 9/17/02, p. 95.

[430] The Qwest witness also testified that what the OP-17 measurement captures is "broader" than trouble tickets generated in Qwest's repair systems in that it should also include troubles captured in call center tickets. Tr. 10/1/02, pp. 20-21. The record in this matter shows that Qwest did not capture troubles in call center tickets.
[431] Ex. 120, at 3.
[432] *Id*. at 4.
[433] *Id.*
[434] Ex. 158 (Murray), at ¶¶ 29-31 and Attachment TLM-16; Ex. 154 at ¶ 24, ¶ 46 and ¶ 91.
[435] Ex. 157 (Murray), at ¶ 29 and Attachment TLM-16.
[436] Ex. 157 (Murray), at ¶ 30 and Attachment TLM-16.
[437] UNE-P Centrex is an important product with over 30,000 lines in service. *See* Tr. 10/1/02, p. 110. *But see* Appendix (attached to this Report) regarding the nature of Qwest's provision of UNE-P Centrex.
[438] Tr. 10/1/02, pp. 116-117.
[439] *See*, *e.g*. *Qwest Nine State Application*, ¶¶ 349-359.
[440] Qwest has proposed MR-8*, to identify NTF results, but the proposed measure lacks any metric for failing to identify actual service problems missed. Despite this lack, the FCC accepted the MR-8* results as explanatory. *Qwest Nine State Application*, ¶ 354, fn. 1286.
[441] Tr. 10/9/02, pp. 8-9.
[442] Qwest apparently now classifies all line sharing troubles as out of service rather than service affecting, as it used to do. Hearing Transcript Vol. 16, pp. 140-141.
[443] Tr. 10/9/02, pp. 10-11.
[444] *Id.*, pp. 17-18.
[445] *Id.*, p.20.
[446] *Id.*, p. 20 and p. 42.
[447] *Id.*, pp. 211-214. *See also* Qwest's cross of Covad witnesses, *Id.*, pp. 41-45 and pp. 221-223.
[448] Ex. 10 at 79-80 (BI-1A, BI-1B, BI-2, BI-4A).
[449]Ex. 151 at 9.
[450] Qwest Performance Brief, at 40.
[451] *See* Ex. 43, WCD-24 ¶¶ 4-6 (Eschelon), Ex. 401, WCD-1 ¶¶ 4-8 (McLeod),
[452] Ex. 31 at ¶ 35.
[453] Ex. 158, TLM-15, Attachment; see also Ex. 473, WCD-23 (Powers Affidavit), Powers Exhibit 2.
[454] Ex. 158, TLM-15, Attachment; *see also* Ex. 43, WCD-23 (Powers Affidavit), Powers Exhibit 2.
[455] Tr. 9/16/02, p. 153; Ex. 108, KPGM Final Report.
[456] Tr. 10/1/02 (Williams) 67, p. 123.
[457] Taken from Trade Secret Ex. 32 (Lundquist), at 27. *See also* Finding 98, *supra*.
[458] Tr. 10/1/02 (Williams) 67:14 – 69:10.
[459] Tr. 9/9/02 (Lundquist) at 23:3-20.
[460] Qwest OSS Brief, at 11 (citing *Alabama/Kentucky/Mississippi/North Carolina/South Carolina 271 Order* at ¶ 179).
[461] Ex. 153 at 7.
[462] Had Qwest disclosed the nature of the UNE-Star data and the parties agreed to its inclusion, there would be no grounds for objecting to that data here. Since Qwest did not disclose the nature of the data to the ROC TAG, Qwest cannot rely upon that body's "consent" in this matter. In the absence of full disclosure of the nature of the data, no consent is possible.
[463] *Qwest Nine State Order*, ¶ 467.
[464] *Id*.
[465] *Qwest Nine State Order*, ¶¶ 474-484.
[466] *Qwest Nine State Order*, ¶ 486.
[467] *See, e.g*. *Qwest Nine State Order*, ¶¶ 475-476, 478, 481, and 483-484.
[468] Ex. 43, WCD-23 (Powers Affidavit), ¶ 16.
[469] *Id.*
[470] Ex. 42 (Deanhardt), WCD-5 (July 3, 2001 Letter from Audrey McKenney, Qwest Sr. Vice President of Wholesale Markets Business Development, to Richard A. Smith, Eschelon President and Chief Operating Officer ("McKenney Letter")), at page 2. The letter explains that the amount paid equals the difference

between $13 per line per month and the amount that Eschelon was able to bill IXCs for switched access based upon the minutes Qwest reported to Eschelon. Ms. McKenney indicated that Qwest "will increase the Interim Amount" to reflect a $16 per line per month level of assumed revenue generation as of January 1, 2001, in consideration for the fact that "Eschelon has devoted substantial internal and external resources to switched access issues, including resources associated with the audit, traffic studies, and hiring of personnel with expertise in access issues."

[471] *Unfiled Agreements*, *supra*, Findings 157-159 (emphasis added). These payments began in July 2001.

[472] Ex. 31 (Lundquist Affidavit), Attachment 6 (December 7, 2001 Letter from Richard A. Smith, Eschelon President and Chief Operating Officer, to Greg Casey and Gordon Martin, Qwest Executive Vice Presidents, Global Wholesale Markets ("Smith Letter")).

[473] Tr. 10/2/02, pp. 216-217.

[474] Ex. 108, (KPMG Final Report), at 415; Tr. 10/2/02, pp. 201-202.

[475] Tr. 10/2/02, p. 201.

[476] Ex. 108, KPMG Final Report at 417.

[477] Ex. 31, ¶ 41.

[478] Ex. 31, ¶ 41.

[479] Ex. 108 (KPMG *Final Report*), at Section IV, Test 19.6, subsection 1.0 and Test 20, subsection 3.1.

[480]Tr. 10/2/02, pp. 209 and 211.

[481] Ex. 43, WCD-22.

[482] *Id*.

[483] *Id*. pp. 3-4.

[484] Ex. 154, at ¶ 112; Ex. 157, at ¶¶ 66-67; Ex. 158, at ¶ 24.

[485] Ex. 10 (Minnesota Performance Results), at 81.

[486] Tr. 10/2/02 (Williams), at 49-50.

[487] Tr. 10/2/02, p. 195. The results of the Bayesian test for BI-3A over the last nine months are the same. Ex. 158, Attachment TLM-12.

[488] Tr. 10/2/02, pp. 229-230.

[489] For instance, there is no billing PID to reflect completeness of daily usage file records. Tr. 10/2/02, p. 197. Hence the problems that CLECs encountered with daily usage file data, discussed above, would never have been detected from PID results.

[490] *Qwest Nine State Order*, ¶ 129.

[491] Ex. 42, Attachment WCD-25, (Affidavit of Tom McNally, June 20, 2002 ("McNally Affidavit")), ¶ 7.

[492] *Id*.

[493] *Id*., at ¶ 5

[494] Qwest objected to inquiry of its witness on this subject as outside the scope of direct. Tr. 10/02/02, pp. 165-168.

[495] Ex. 156 (Murray Reply), ¶¶ 144-145.

[496] Id., at ¶ 146.

[497] *Ameritech Michigan Order*, ¶ 141 (1997).

[498] *SWBT Texas 271 Order*, at ¶ 108.

[499] *See, e.g., Georgia/Louisiana 271 Order*, at App. D, ¶¶ 40-42.

[500] AT&T CMP Brief, at pp. 4-5.

[501] Ex. 62 (Menezes Affidavit), at 10.

[502] *See* DOJ Qwest I Evaluation at ¶¶ 25-31.

[503] *Qwest Nine State Order*, ¶ 135.

[504] *See* Ex. 108 (Exhibit 108), at Test 23 (test criterion 23-1-8).

[505] Qwest OSS Brief, at 82-83.

[506] *See* Ex. 62 (Menezes Affidavit), at attachment MHM-CMP-2 (Exception 3111).

[507] AT&T CMP Brief, at 15.

[508] *Id*.

[509] Ex. 188, at TMC-CMP-2 (Exception 3029) at 1.

[510] Ex. 188, at TMC-CMP-2 (Exception 3029 Disposition Report3/14/02).

[511] Ex. 108, at 591.

[512] *Qwest Nine State Order*, ¶ 139 (citations omitted).
[513] *Qwest Nine State Order*, ¶ 140.
[514] Ex. 87 (Rea Surreply), at 7.
[515] A Washington customer was excluded from the record as not relevant to Minnesota issues. A Colorado customer experience was withdrawn from consideration at the customer's request.
[516] *BellSouth Georgia/Louisiana Order,* ¶¶ 301-303.
[517] *Id.,* ¶ 303.
[518] Minn. R. 1400.7300, subp. 5.
[519] *SWBT Texas 271 Order*, 15 FCC Rcd 18354, 18374, ¶. 46; *Bell Atlantic New York 271 Order*, ¶ 46.
[520] Minn. R. 1400.7300, subp. 5.
[521] Minn. R. 1400.7300, subp. 5.